

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

B. W. ALEXANDER, BECKWITH MERCANTILE COMPANY, a Montana Corporation, JOHN A. HAZEL, THEODORE KNUTSON and EDNA I. KNUTSON, his wife, P. W. SORENSEN, AVERY A. STEVENS, MEIL C. PIERCE, BERT LISH, BERT MYERS NELSON, JOHN ELLIS, J. A. McKEEVER, AXEL ERICKSON, JOHN MINESINGER and ADA B. MINESINGER, his wife, and THOMAS WALD,

Appellees,

and

FLATHEAD IRRIGATION DISTRICT, a corporation, and DENNIS A. DELLWO,

Appellants,

vs.

B. W. ALEXANDER, et al.,

Appellees.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 494

Upon Appeals from the District Court of the
United States for the District of Montana.

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Appellant,

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B. W. ALEXANDER, BECKWITH MERCANTILE COMPANY, a Montana Corporation, JOHN A. HAZEL, THEODORE KNUTSON and EDNA I. KNUTSON, his wife, P. W. SORENSEN, AVERY A. STEVENS, MEIL C. PIERCE, BERT LISH, BERT MYERS NELSON, JOHN ELLIS, J. A. McKEEVER, AXEL ERICKSON, JOHN MINESINGER and ADA B. MINESINGER, his wife, and THOMAS WALD,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

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[1*]

In the District Court of the United States In and
for the District of Montana

No. 1529.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

B. W. ALEXANDER, et al.,

Defendants.

FLATHEAD IRRIGATION DISTRICT, et al.,

Intervenors.

Be It Remembered that on April 23rd, 1936, the
Plaintiff filed herein its Bill of Complaint which is
in the words and figures following, to wit: [2]

In the District Court of the United States
for the District of Montana
Missoula Division
No. 1529.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

B. W. ALEXANDER, BECKWITH MERCANTILE COMPANY, a Montana Corporation, JOHN A. HAZEL, THEODORE KNUTSON and EDNA I. KNUTSON, his wife, P. W. SORENSEN, AVERY A. STEVENS, MEIL C. PIERCE, BERT LISH, BERT MYERS NELSON, JOHN ELLIS, J. A. McKEEVER, AXEL ERICKSON, JOHN MINESINGER and ADA B. MINESINGER, his wife, and THOMAS WALD,
Defendants.

BILL OF COMPLAINT.

Comes now John B. Tansil, United States Attorney for the District of Montana, acting under and by authority of the Attorney General of the United States, brings this Bill of Complaint and alleges:

I.

That the defendants, B. W. Alexander, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorensen, Avery A. Stevens, Meil

C. Pierce, Bert Lish, Bert Myers Nelson, John Ellis, J. A. McKeever, Axel Erickson, John Minesinger and Ada B. Minesinger, his wife, and Thomas Wald are citizens of the United States and the State of Montana, and that they reside within the confines of the Flathead Indian Reservation in Montana. That the Beckwith Mercantile Company is a corporation created, organized and existing under and by virtue of the laws of the State of Montana.

II.

That by virtue of a treaty between the United States of America and the confederated tribes of Flathead, Kootenai and Upper Pend D'Oriellis Indians made July 16, 1855 (12 Stat. 975), ratified [3] March 8, 1859, by the Senate of the United States and regularly proclaimed by the President of the United States April 15, 1859, the confederated tribes ceded, released and conveyed to the United States all their right, title and interest in and to a large portion of the country then occupied or claimed by them, being in what is now the north-western part of the State of Montana, and the United States set aside and then reserved for the exclusive use, benefit and occupancy of the said confederated tribes and as a general Indian reservation, upon which might be placed other friendly tribes and bands of Indians, a part of the land so ceded and relinquished, which part so set aside and reserved as an Indian reservation is designated and known as the Flathead Indian Reservation; that

said Indian reservation is now situate in the counties of Missoula, Lake, Flathead and Sanders, in the State of Montana, and its boundaries were at the time of the creation of said reservation fixed and defined as follows, to wit: Commencing at the source of the main branch of the Jocko River; thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko River, to a point on Clark's Fork between Camas and Horse Prairies; thence northerly to and along the divide bounding on the west of the Flathead River, to a point due west from the point half way in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course to the divide whence the Crow, the Pruna, the So-ni-el-em and the Jocko Rivers take their rise, and thence southerly along said divide to the place of beginning. That ever since said 8th day of April, 1859, the above mentioned and described tract of land, has been, and the same is now, an Indian reservation, subject to the rights of said tribes, and the said reservation since said 8th day of [4] April, 1859, has been, and now is, occupied and inhabited by said tribes of Indians.

III.

That by the establishment of this reservation, the United States became the trustee of the Confederated Tribes of the Flathead, Kootenai and Upper Pend d'Oreilles Indians, holding legal title to all of the lands and waters of the Flathead Indian Reser-

vation, which boundaries are defined in paragraph 2 of this complaint and there was then reserved to said Indians for irrigation and other beneficial uses upon the lands of said Reservation and exempted from appropriation under territorial or State laws or otherwise all of the waters upon said reservation, including all of the waters of Post Creek, which has its source and flows wholly within the boundaries of said Reservation.

IV.

That by virtue of the Act of Congress of April 30, 1908 (35 Stat. L. 70, 83), the sum of Fifty Thousand (\$50,000) Dollars was appropriated from public moneys for preliminary surveys, plans and estimates of Irrigating systems to irrigate the lands allotted by the Act of Congress of April 23, 1904 (33 Stat. 302), and the unallotted and irrigable lands on the Flathead Indian Reservation, and to begin construction of the same; that in succeeding years by acts of Congress further amounts were appropriated for the construction, operation and maintenance of the system thus commenced; that up to June 30, 1935 the United States had expended the sum of \$7,238,189.19 for the construction of the Flathead irrigation project in Montana; and that the United States now owns, operates and is in control of the Flathead irrigation project. That during the 1935 irrigation season there were irrigated 67,513 acres of land through the Flathead irrigation project system on the Flathead Indian Reservation

in Montana; that all of the waters of Post Creek so appropriated and diverted by the United States for use in its Flathead irrigation project are necessary [5] for the successful irrigation of lands lying under said project.

V.

That at the time of the ratification of said treaty of July 16, 1855, and ever since said time continuing to the present, Post Creek was and is an existing, innavigable stream of water rising in the Mission mountains located on the Flathead Indian Reservation in Montana, and flowing in a southwesterly direction through a well defined channel with natural banks, and in its natural course across lands of said reservation empties into Mission Creek at a point located within said reservation.

VI.

That as further notice to all landowners and settlers along Post Creek that the United States was the sole owner of the waters flowing therein and of the right to the use of the same, pursuant to the provisions of the Act of Congress of June 17, 1902 (32 Stat. 388), and under and by virtue of an Act of the Legislative Assembly of the State of Montana, entitled: "An Act authorizing the Government of the United States to appropriate the water of the streams of the State of Montana * * *," approved February 27, 1905 (Revised Codes of Montana, 1921, Section 7099), the United States through H. N. Savage, Supervising Engineer, U. S.

Reclamation Service, thereunto duly authorized by the Secretary of the Interior of the United States in that behalf, did make the following appropriations of the waters of Post Creek and its tributaries:—

Date of Appropriation	Amount of Appropriation	Date of Recordation in Office of County Clerk & Recorder, Missoula County, Montana	Vol. & Page Recorded in Book of Water Rights
Mar. 13, 1913	5,000 cubic feet of water per sec- ond of time	April 7, 1913	Vol. J, p. 21
Mar. 31, 1913	500 cubic feet of water per sec- ond of time	April 7, 1913	Vol. J, p. 13
Apr. 5, 1912 Mar. 29, 1913	500 cubic feet of water per sec- ond of time	April 7, 1913	Vol. J, p. 25

[6]

That the United States applied these waters to beneficial use within the time specified by the laws of the State of Montana and for the purposes as set out in the aforesaid Notices of Appropriation; that the United States has continuously used and is now using all of the waters of Post Creek in its Flathead Irrigation Project System.

VII.

That pursuant to the Acts of Congress of June 21, 1906 (34 Stat. 354), and May 29, 1908 (35 Stat. 448), the United States, through its designated agent, the Secretary of the Interior, recognized all early water right developments of Indians and white settlers on the Flathead Indian Reservation

in Montana which had been made prior to the year 1909.

That a committee appointed by the Secretary of the Interior made personal investigations on the ground and heard testimony and reviewed surveys made by engineers of the United States Reclamation Service of each tract of land on the Flathead Indian Reservation in Montana where irrigation had been used and early water right developments made prior to the year 1909.

That on December 10, 1919, this committee reported to the Secretary of the Interior in regard to early developments of water rights on Post Creek and other streams within the boundaries of the Flathead Indian Reservation in Montana and made certain recommendations in accordance with instructions of the Secretary of the Interior issued pursuant to law. That the report of said committee and its recommendations were approved by said Secretary on November 25, 1921.

VIII.

That the defendant, B. W. Alexander, is in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana:

The East half ($E1\frac{1}{2}$) of the Northeast quarter ($NE\frac{1}{4}$), of Section Sixteen (16), Township Nineteen (19) North, Range Nineteen (19), West, Montana Principal Meridian. [7]

That pursuant to the aforesaid Acts of Congress of June 21, 1906 and May 29, 1908 on November 25, 1921 the Secretary of the Interior granted a valid and subsisting water right from Post Creek to 16.8 acres of the above described tract, formerly known as the Duncan McDonald allotment No. 561, to the extent of two (2) acre feet of water per acre per annum, or a total of 33.6 acre feet per annum.

IX.

That the defendants, the Beckwith Mercantile Company, a Montana corporation, and John A. Hazel, are in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana:

The Southwest quarter (SW $\frac{1}{4}$) of the Northeast quarter (NE $\frac{1}{4}$) and the Northwest quarter (NW $\frac{1}{4}$) of the Southeast quarter (SE $\frac{1}{4}$) of Section Sixteen (16), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

That pursuant to the aforesaid Acts of Congress of June 21, 1906 and May 29, 1908 on November 25, 1921, the Secretary of the Interior granted a valid and subsisting water right from Post Creek to 8.2 acres of the above described tract, formerly known as the Florence McDonald allotment No. 560, to the extent of two (2) acre feet of water per acre per annum, or a total of 16.4 acre feet per annum.

X.

That the defendants, Theodore Knutson and Edna I. Knutson, his wife, are in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana:

The Southeast quarter ($SE\frac{1}{4}$) of the Northwest quarter ($NW\frac{1}{4}$) and the Northeast quarter ($NE\frac{1}{4}$) of the Southwest quarter ($SW\frac{1}{4}$), Section Sixteen (16), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

That pursuant to the aforesaid Acts of Congress of June 21, 1906 and May 29, 1908 on November 25, 1921 the Secretary of the Interior granted a valid and subsisting water right from Post Creek to 3.2 acres of the above described tract, formerly known as the Mary C. McDonald allotment No. 559, to the extent of two (2) acre feet of water per acre per annum, or a total of 6.4 acre feet per annum. [8]

XI.

That the defendant, P. W. Sorensen, is in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana:

The West half ($W\frac{1}{2}$) of the Southwest quarter ($SW\frac{1}{4}$) of Section Sixteen (16), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

That pursuant to the aforesaid Acts on Congress of June 21, 1906 and May 29, 1908 on November 25,

1921 the Secretary of the Interior granted a valid and subsisting water right from Post Creek to 18.3 acres of the above described tract, formerly known as the Frank Fiddler allotment No. 785, to the extent of two (2) acre feet of water per acre per annum, or a total of 36.6 acre feet per annum.

XII.

That the defendant, Avery A. Stevens, is in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana:

The Southwest quarter ($SW\frac{1}{4}$) of the Northwest quarter ($NW\frac{1}{4}$) of Section Sixteen (16), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian, and the Southeast quarter ($SE\frac{1}{4}$) of the Northeast quarter ($NE\frac{1}{4}$) of Section Seventeen (17), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

That pursuant to the aforesaid Acts on Congress of June 21, 1906 and May 29, 1908 on November 25, 1921, the Secretary of the Interior granted a valid and subsisting water right from Post Creek to 11.1 acres of the above described tract, formerly known as the William Deschamps allotment No. 781, to the extent of two (2) acre feet of water per acre per annum, or a total of 22.2 acre feet per annum.

XIII.

That the defendants, Avery A. Stevens and Meil C. Pierce, are in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana:

The East half ($E\frac{1}{2}$) of the Southeast quarter ($SE\frac{1}{4}$) of Section 17, Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

That pursuant to the aforesaid Acts on Congress of June 21, 1906 and May 29, 1908 on November 25, 1921 the Secretary of the Interior granted [9] a valid and subsisting water right from Post Creek to 10.3 acres of the above described tract, formerly known as the Edward Deschamps allotment No. 783, to the extent of two (2) acre feet of water per acre per annum, or a total of 20.6 acre feet per annum.

XIV.

That the defendants, Bert Lish, Bert Myers Nelson and John Ellis, are in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana:

The West half ($W\frac{1}{2}$) of the Southeast quarter ($SE\frac{1}{4}$) of Section Seventeen (17), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

That pursuant to the aforesaid Acts of Congress of June 21, 1906 and May 29, 1908 on November 25, 1921 the Secretary of the Interior granted a valid

and subsisting water right from Post Creek to 14.1 acres of the above described tract, formerly known as the Ora Deschamps allotment No. 784, to the extent of two (2) acre feet of water per acre per annum, or a total of 28.2 acre feet per annum.

That the defendant, J. A. McKeever, is in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana:

The North half ($N\frac{1}{2}$) of the Northwest quarter ($NW\frac{1}{4}$) of Section Twenty-one (21), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

That pursuant to the aforesaid Acts of Congress of June 21, 1906 and May 29, 1908 on November 25, 1921 the Secretary of the Interior granted a valid and subsisting water right from Post Creek to 1.4 acres of the above described tract, formerly known as the Caroline McKeever allotment No. 791, to the extent of two (2) acre feet per acre per annum, or a total of 2.8 acre feet per annum.

XVI.

That during the months of June, July, August and September of the irrigation season in the year 1935, the said defendants, B. W. Alexander, the Beckwith Mercantile Company, a Montana corporation, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorensen, Avery A. Stevens, Meil C. Pierce, Bert Lish, Bert Myers

Nelson and J. A. [10] McKeever, wrongfully and unlawfully diverted from Post Creek through a private ditch known as the McDonald-Deschamps Ditch, 1051.91 acre feet of water; that the amounts they were lawfully entitled to divert under the Secretary of the Interior's decrees of November 25, 1921, were 166.8 acre feet of water during the entire year of 1935; that said defendants threaten to continue to unlawfully divert said excessive amounts of waters of Post Creek contrary to the decrees of the Secretary of the Interior and unless enjoined and restrained will continue so to do.

XVII.

That the defendant, Axel Erickson, is in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana:

The North half ($N\frac{1}{2}$) of the Northwest quarter ($NW\frac{1}{4}$) of Section Seventeen (17), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

That pursuant to the aforesaid Acts on Congress of June 21, 1906 and May 29, 1908 on November 25, 1921 the Secretary of the Interior granted a valid and subsisting water right from Post Creek to 77.4 acres of the above described tract, known as the Julia Minesinger allotment No. 691, to the extent of two (2) acre feet of water per acre per annum, or a total of 154.8 acre feet per annum.

XVIII.

That the defendants, John Minesinger and Ada B. Minesinger, his wife, are in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana:

The South half ($S\frac{1}{2}$) of the Northwest quarter ($NW\frac{1}{4}$) of Section Seventeen (17), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

That pursuant to the aforesaid Acts of Congress of June 21, 1906 and May 29, 1908, on November 25, 1921 the Secretary of the Interior granted a valid and subsisting water right from Post Creek to 75.4 acres of the above described tract, formerly known as the John Minesinger allotment No. 690, to the extent of two (2) acre feet of water per acre per annum, or a total of 150.8 acre feet per annum.

XIX.

That the defendant, Thomas Wald, is in possession and control of the following described lands lying within the Flathead Indian Reservation in Montana: [11]

The West half ($W\frac{1}{2}$) of the Southwest quarter ($SW\frac{1}{4}$) of Section Seventeen (17), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

That pursuant to the aforesaid Acts of Congress of June 21, 1906 and May 29, 1908, on November 25, 1921 the Secretary of the Interior granted a valid and subsisting water right from Post Creek

to 52.3 acres of the above described tract, formerly known as the James Waymack allotment No. 689, to the extent of two (2) acre feet of water per acre per annum, or a total of 104.6 acre feet per annum.

XX.

That the defendant, Thomas Wald, is also in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana:

The East half ($E\frac{1}{2}$) of the Southwest quarter ($SE\frac{1}{4}$) of Section Eighteen (18), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

That pursuant to the aforesaid Acts of Congress of June 21, 1906 and May 29, 1908, on November 25, 1921 the Secretary of the Interior granted a valid and subsisting water right from Post Creek to 80 acres of the above described tract, formerly known as the Emma M. Magee allotment No. 688, to the extent of two (2) acre feet of water per acre per annum, or a total of 160 acre feet per annum.

XXI.

That during the months of June, July, August and September of the irrigation season in the year 1935, the said defendants, Axel Erickson, John Minesinger and Ada B. Minesinger, his wife, and [12] Thomas Wald, wrongfully and unlawfully diverted from Post Creek through a private ditch known as the Magee-Minesinger Ditch, 2180.9 acre feet of water; that the amounts they were lawfully

entitled to divert under the Secretary of the Interior's decree of November 25, 1921, were 570.2 acre feet of water during the entire year of 1935; that said defendants threaten to continue to unlawfully divert said excessive amounts of water of Post Creek contrary to the decree of the Secretary of the Interior and unless enjoined and restrained will continue so to do.

XXII.

That pursuant to the Act of Congress of May 29, 1908 (35 Stat. 448), on November 25, 1921, the Secretary of the Interior promulgated certain rules and regulations in respect to all persons, on the Flathead Indian Reservation in Montana, using water under a decree of the Secretary of the Interior, whereby all affected persons, including said defendants were directed to install suitable headgates at the point where their private ditch taps the stream and at some suitable place on said ditch, as near the head thereof as practicable, place and maintain a proper measuring box, weir or other appliance for the measurement of water flowing in said ditch.

XXIII.

That on several occasions during the irrigation season of 1935, [13] Henry Gerharz, as Project Engineer of the Flathead Irrigation Project and Water Commissioner for the Flathead Indian Reservation, the designated agent of the Secretary of the Interior, notified all of the defendants herein of the above regulations of the Secretary of the In-

terior and demanded of said defendants that they comply with the same. That said defendants, each and all of them have wholly failed, have refused and continue to refuse to comply with said rules and regulations promulgated as aforesaid.

XXIV.

That on several occasions during the irrigation season of 1935, Henry Gerharz, as Project Engineer of the Flathead Irrigation Project and Water Commissioner for the Flathead Indian Reservation, the designated agent of the Secretary of the Interior, notified all of the defendants herein of the amounts of water decreed their lands by the Secretary of the Interior; that they were diverting in excess of the amounts allowed; and demanded of said defendants that they limit their diversions to the amounts so allowed by said Secretary. That said defendants wholly refused to cut down their diversions and continued to divert said waters of Post Creek in excess of the amounts decreed as aforesaid.

XXV.

That the said defendants in diverting and using the waters of Post Creek in excess of the amounts allowed by the Secretary of the Interior, as aforesaid, have been acting entirely without right and wrongfully and unlawfully, and without the consent of this plaintiff or any of its officers or agents, the superintendent of the Flathead Indian Reservation, the Flathead tribe of Indians, the project engineer of the Flathead irrigation project, the Water Com-

missioner for the Flathead Indian Reservation, or anyone who could lawfully give such consent.

XXVI.

That said defendants in so doing the acts complained of have deprived the Flathead irrigation project of large amounts of water for use in its system for distribution to other lands lying under its [14] canals. That said water so diverted in excess of the amounts allowed by the Secretary of the Interior pursuant to law are necessary for the successful cultivation of other lands lying under the Flathead irrigation project system and the growing of crops thereon and have caused said lands to have available therefor an inadequate supply of water.

XXVII.

That by reason of the refusal of said defendants to abide by the regulations of the Secretary of the Interior made pursuant to law in failing to have suitable head gates installed at the points where the McDonald-Deschamp and the Magee-Minesinger ditches tap Post Creek and in failing to install at some suitable place on said ditches and as near the heads thereof as practicable a proper measuring box, weir, or other appliance for the measurement of the water flowing in said ditch and in failing to measure the water used upon their lands and wrongfully and unlawfully diverting through said ditches excessive amounts of water, great and irreparable injury, loss and damage has been suffered by the plaintiff, and such irreparable injury, loss and dam-

age will continue to be suffered by plaintiff so long as said water is so diverted and taken; that by reason of the plaintiff being unable to deliver sufficient waters to other lands lying under its project system necessary for the successful cultivation of the same, largely aggravated as a result of these unlawful and excessive diversions, many tracts of land, which would be paying plaintiff operation and maintenance charges, are not being farmed because of the shortage of water as aforesaid.

That great and irreparable loss and damage is being caused plaintiff and its irrigation project system by the excessive diversions of the defendants and each of them, and by their interference with said irrigation project system by the excessive diversions of the defendants and each of them, and by their interference with said irrigation project so built and constructed as aforesaid, and by the taking therefrom of waters lawfully belonging to this plaintiff for [15] use in its irrigation project system, and to which it is entitled to have flow to and through the said Flathead irrigation project.

XXVIII.

That said plaintiff has no plain, speedy, adequate or complete remedy at law; or otherwise, nor any remedy whatsoever except in a Court of Equity where such matters are cognizable.

Wherefore said plaintiff prays that a permanent injunction issue enjoining and restraining the said defendants, their agents, servants, or employees,

and all persons claiming under, through or by them, from diverting any waters of Post Creek, and its tributaries, in excess of the amounts decreed by the Secretary of the Interior, as aforesaid, and from diverting any waters of Post Creek, and its tributaries to said lands described herein, owned by them or in their control, until said defendants have installed suitable head gates at the points where the McDonald-Deschamp and the Magee-Minesinger ditches tap Post Creek, and until they have placed a proper measuring box, weir, or other appliance for the measurement of the waters flowing in said ditches, at some suitable place on said ditches; that plaintiff have and recover its costs and disbursements herein expended, and that said plaintiff have such other and further relief as shall appear to the Court meet and proper.

JOHN B. TANSIL,

United States Attorney for
the District of Montana.

KENNETH R. L. SIMMONS,

District Counsel, Department
of the Interior, United
States Indian Irrigation
Service.

[Verification]

[Endorsed]: Filed April 23, 1936. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.]

[16]

Thereafter, on May 19, 1936, Demurrer to Complaint was filed herein, in the words and figures following, to wit: [17]

[Title of District Court and Cause.]

DEMURRER

(of all defendants)

Now come the defendants above named and demur to the complaint of plaintiff filed herein, and as grounds therefor allege:

I.

That the complaint does not state facts sufficient to constitute a cause of action against these defendants or each or any of them.

II.

That the complaint is ambiguous:

1. That it cannot be ascertained from said complaint what interest plaintiff has in or right to defendants' lands described, or what interest in, or right to any appurtenance thereto belonging.

2. The amount of water admittedly defendants own or have the right to the use of cannot be ascertained from said complaint. While the complaint alleges "acre feet", there is no such measurement authorized or recognized in the State of Montana.

3. That it cannot be ascertained from said complaint whether plaintiff, as sole owner of the lands and water on the Flathead Indian Reservation claims the right to interfere with defendants' use of the water, or whether, as an appropriator of

water under the laws of the State of Montana, there is a conflict in the use of said water, and that this is an action for the protection of rights acquired to the waters of Post Creek. [18]

III.

That the complaint is unintelligible and uncertain in this:

1. In Paragraph 2 of said complaint it is claimed that the United States set aside and reserved for the exclusive use, benefit and occupancy of the Confederate Tribes a general Indian Reservation, and whereas said Treaty referred to expressly reserved from the lands ceded to the United States for the use and occupation of the said Confederate Tribes and as a general Indian Reservation certain described lands, and such reserved lands were never ceded to the United States, according to the said Treaty, and the United States never, at any time, became the owner of any of said lands, or any of the water thereon.

IV.

1. There is a defect of parties defendant in that this is an action to adjudicate the waters of Post Creek and it is alleged that the distribution and use of said water is under the jurisdiction of the Secretary of the Interior, and therefore the Secretary of the Interior is a necessary party to this action.

2. The complaint sets forth that this water is under the supervision and control of one Henry

Gerharz as Project Manager of the Flathead Irrigation Project and as Water Commissioner for the Flathead Irrigation District and therefore said Henry Gerharz, as such alleged Project Manager, and such alleged Water Commissioner, is a necessary party so that his acts may be controlled by this Court in a final decree.

3. Said complaint alleges other rights to the use of the waters of Post Creek, and many other ditches, the owners of [19] which are necessary defendants in order that the whole controversy may be settled in one action if this is an action to have adjudicated the various rights on Post Creek.

4. There is a misjoinder of parties defendant in that two ditch owners are set out and described in the complaint and the owners of which ditches have no connection one with the other, and therefore all of the parties using water on Post Creek should be brought in on one complaint, or this action should be dismissed as to one or the other of the owners of the two ditches mentioned.

Dated this 19th day of May, 1936.

ELMER E. HERSHEY

Missoula, Montana

Attorney for defendants.

[Endorsed]: Filed May 19, 1936. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.

[20]

That on September 14, 1936, Order overruling Demurrer was duly entered herein, in the words and figures following, to wit: [21]

[Title of District Court and Cause.]

ORDER OVERRULING DEMURRER TO
BILL OF COMPLAINT.

The bill of complaint in this case is far from a model of good pleading, however, it is, in my opinion, sufficient to withstand the attack made upon it. (Treaty of July 16, 1855, 12 Stat. L. 975; 2 Kappler Indian Laws and Treaties, 722, 723 and 724; Fletcher v. Peck, 6 Cranch 142, 10 U. S. 79; Johnson & Graham's Lessee v. McIntosh, 8 Wheat. 572, 21 U. S. 252; American Insurance Company v. 356 Bales of Cotton, 1 Pet. 541, 26 U. S. 411; Beecher v. Wetherby, 95 U. S. 517; Minnesota v. Hitchcock, 185 U. S. 373, 389; U. S. v. Richert, 188 U. S. 432; U. S. v. Joseph, 94 U. S. 618; U. S. v. Celestine, 215 U. S. 278; Hallowell v. U. S., 221 U. S. 317; Ex Parte Van Moore, 221 Fed. 968; U. S. v. Wightman, 230 Fed. 218; Lone Wolf v. Hitchcock, 187 U. S. 553; Spaulding v. Chandler, 160 U. S. 395; Secs. 1 & 17 of the Organic Act of the Territory of Montana, approved May 26, 1864, 13 Stat. 85; Sec. 4 of the Enabling Act, approved February 22, 1889, 25 Stat. 676; Ordinance No. 1, Second, Constitution of the State of Montana; Winters v. U. S., 207 U. S. 563, 148 Fed. 684 and 143 Fed. 749; Conrad Investment Company v. U. S., 161 Fed. 829 and 156 Fed. 124; North Side Canal Company v. Twin Falls Canal Company, 12 Fed. 2d 311, 314)

It follows that the demurrer, both general and special, to the bill of complaint on file herein should be and it is hereby overruled. The defendants are, and each of them is, granted an exception to this ruling and ten (10) days after written notice thereof in which to plead further if so advised.

Done September 14, 1936.

JAMES H. BALDWIN
United States District Judge,
District of Montana.

[Endorsed]: Filed Sept. 14, 1936. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.
[22]

Thereafter, on September 23, 1936, an Answer was duly filed herein, in the words and figures following, to wit: [23]

[Title of District Court and Cause.]

ANSWER

Now comes B. W. Alexander, Beckwith Mercantile Company, a corporation, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorensen, Avery A. Stevens, Meil C. Pierce, Bert Lish, John Minesinger and Ada B. Minesinger, his wife, and Thomas Wald and for their answer to the bill of complaint filed herein admit, deny and allege as follows:

I.

Admit that the defendants herein named are citizens of the United States and the State of Montana, and that they reside in Lake County, Montana. Admit that the Beckwith Mercantile Company is a corporation created, organized and existing under and by virtue of the laws of the State of Montana. Deny all other allegations of Paragraph 1 not heretofore admitted.

II.

Admit that a treaty between the United States of America and the confederated tribes of Flathead, Kootenai and Upper Pend D'Orielle Indians was made and ratified and proclaimed as set forth in Paragraph II of said complaint.

Admit that said confederated tribes ceded, relinquished and conveyed to the United States a large part of the country then owned or claimed by them.

Deny that the United States set aside and then reserved for the exclusive use, benefit and occupancy of said confederated tribes as a general Indian reservation any part of the land so ceded, relinquished or conveyed. Deny that the [24] Indian reservation designated and known as the Flathead Indian Reservation is a part of the lands ceded, relinquished or conveyed to the United States by said treaty. Deny that the lands described in said Paragraph 2 is now an Indian reservation subject to the rights of said tribe or otherwise. Deny that the lands so described in said paragraph 2 since said 8th day of April, 1859 have been, or now are, oc-

cupied or inhabited by said tribe of Indians as alleged in said paragraph.

These defendants deny all of the allegations of Paragraph 2 not herein admitted.

III.

Deny that by the establishment of this reservation the United States, as sole owner of the lands and waters thereon, or as part owner or any owner whatever, made any reservation for irrigation or other beneficial use upon the lands of said reservation, and deny that the United States exempted from appropriation under territorial or state law or otherwise all or any of the waters upon said reservation, either the waters of Post Creek or at all.

Deny each and every allegation of Paragraph 3 not herein admitted.

IV.

These defendants deny that they have any information sufficient to form a belief as to the allegations of Paragraph 4 of said bill of complaint and for this reason deny each and every allegation of Paragraph 4.

V.

Admit that Post Creek at all times was and is an existing, unnavigable and innavigable stream of water rising in the [25] Mission Mountains in Montana and that it flows in a southwesterly direction through a well defined channel with natural banks.

Deny all other allegations of Paragraph 5.

VI.

Deny the allegations of Paragraph 6 and the whole thereof.

VII.

Deny the allegations of Paragraph 7 and the whole thereof.

VIII.

Admit that the defendant B. W. Alexander is in control and possession of the lands described in said complaint, and admit that said lands were allotted to Duncan McDonald, No. 561.

Deny all other allegations of said paragraph 8.

IX.

Admit that the defendants, the Beckwith Mercantile Company, a Montana corporation, and John A. Hazel are in control and possession of the lands described in Paragraph 9 and admit that said lands were allotted to Florence McDonald No. 560.

Deny all other allegations of said Paragraph 9.

X.

Admit that the defendants Theodore Knutson and Edna I. Knutson, his wife, are in control and possession of the lands described in Paragraph 10, and admit that said lands were allotted to Mary C. McDonald, No. 559.

Deny all other allegations of said Paragraph 10.

XI.

Admit that the defendant P. W. Sorensen is in control and possession of the lands described in Paragraph 11, and admit that said lands were allotted to Frank Fiddler, No. 785.

Deny all other allegations of said Paragraph 11.
[26]

XII.

Admit that the defendant Avery A. Stevens is in control and possession of the lands described in Paragraph 12, and admit that said lands were allotted to William Deschamps, No. 781.

Deny all other allegations of said Paragraph 12.

XIII.

Admit that the defendants Avery A. Stevens and Neil C. Pierce are in control and possession of the land described in Paragraph 13, and admit that said lands were allotted to Edward Deschamps, No. 783.

Deny all other allegations of said Paragraph 13.

XIV.

Admit that the defendant Bert Lish is in control and possession of the Southwest Quarter of the Southeast Quarter of Section 17, Township 19 North, Range 19 West Montana Meridian, and admit that said lands were allotted to Ora Deschamps, No. 784.

Deny all other allegations of said Paragraph 14.

XV.

Deny the allegations of Paragraph 16 and the whole thereof.

XVI.

Admit that the defendants John Minesinger and Ada B. Minesinger are in control and possession of the lands described in Paragraph 18, and admit that said lands were allotted to John Minesinger, No. 690.

Deny all other allegations of said Paragraph 18.

XVII.

Admit that the defendant Thomas Wald is in control and possession of the lands described in Paragraph 19, and admit that [27] said lands were allotted to James Waymack, No. 689.

Deny all other allegations of said Paragraph 19.

XVIII.

Admit that the defendant Thomas Wald is in control and possession of the lands described in Paragraph 20, and admit that said lands were allotted to Emma M. Magee, No. 688.

Deny all other allegations of said Paragraph 20.

XIX.

Deny the allegations of Paragraph 21 and the whole thereof.

XX.

Deny the allegations of Paragraph 22 and the whole thereof.

XXI.

Deny each and all the allegations contained in said bill of complaint, not herein specifically admitted, qualified or denied.

These Defendants, Further Answering the Bill of Complaint of Plaintiff Herein, and as a New Matter Entitling Them to Affirmative Relief, Allege as Follows:

1. That on the 16th day of July, 1855 a treaty was made and concluded on the part of the United States of America and the confederated tribes of Flathead, Kootenai and Upper Pend D'Oriellis Indians whereby said Indians ceded, relinquished and conveyed to the United States all their right, title and interest in and to the country owned or claimed by them, particularly bounded and described in Article 1 of said treaty. Article 2 of said treaty reserved from the lands ceded for the use and occupation of said confederated tribes, as a general Indian reservation, certain lands to be known as the Flathead Indian Reservation.

Said tract was to be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian Reservation. No white man was to be permitted to reside upon said reservation without the [28] permission of said confederated tribes.

2. On April 23, 1904 (33 Stat. L. p. 302) Congress of the United States passed an Act for the survey and allotment of the lands embraced within said Indian reservation and the sale of all surplus lands after allotment, and in said Act made express provision that the United States, the plaintiff herein, should not be bound to purchase any portion of the lands of said Indian reservation.

3. That said lands on said reservation, and particularly the lands described in plaintiff's complaint and this answer, are arid lands and require artificial irrigation in order to produce crops to the full extent of the soil thereof, and that generally one inch per acre is at all times necessary and required for the irrigation of said lands; that beneficial use is the measure of the right in the irrigation of said land.

That on or about the first day of May, 1905 what is known as the McDonald-Deschamps Ditch was dug and constructed from Post Creek to the lands hereinafter described with a carrying capacity of 500 inches, or $12\frac{1}{2}$ cubic feet of water per second of time, and the Indian allottees who dug said ditch appropriated through said ditch sufficient water to irrigate their land as hereinafter set forth; and on or about the first day of May, 1906, the ditch known as the Magee-Minesinger ditch was dug and constructed from Post Creek to the lands hereinafter described, said ditch having a carrying capacity of 600 inches or 15 cubic feet of water per second of time, and the Indian allottees who dug said ditch appropriated, through said ditch, sufficient water to irrigate their lands as hereinafter set forth. [29]

That trust patents issued to each of said Indian allottees on or about October 8, 1908, and thereafter fee patents were issued to each of said Indian allottees, and said Indian allottees thereby became the sole owner in fee of said lands, with all the rights,

privileges, immunities and appurtenances of whatsoever nature thereunto belonging, including the water appurtenant thereto appropriated through said McDonald-Deschamps Ditch and said Magee-Minesinger Ditch and lateral ditches dug and constructed, carrying water to the lands so owned by each; that the defendants herein became the purchasers of said lands, with all the rights, privileges, immunities and appurtenances of whatsoever nature, and now are the owners of said lands and water right from Post Creek.

4. That the following parties, defendants herein, are the owners of the lands in their control and possession, and water from the McDonald-Deschamps Ditch, to-wit:

(a) B. W. Alexander is the owner of the lands patented to Duncan McDonald under allotment No. 561, described as follows:

The East Half of the Northeast Quarter of Section 16, Township 19 North, Range 19 West Montana Meridian.

That said defendant is using 50 inches of water on said 80 acres, and the same is necessary and required to properly irrigate said 80 acres of land. Said appropriation was made through the McDonald-Deschamps Ditch as aforesaid.

(b) The Beckwith Merchantile Company, a Montana corporation, and John A. Hazel, are the owners of the lands patented to Florence McDonald under allotment No. 560, described as follows:

The Southwest Quarter of the Northeast Quarter and the Northwest Quarter of the Southeast Quarter of Section 16, Township 19, North Range 19 West, Montana Meridian.

That said defendants are using 50 inches of water on said 80 acres, and the same is necessary and required to properly [30] irrigate said 80 acres of land. Said appropriation was made through the McDonald-Deschamps Ditch as aforesaid:

(c) That Theodore Knutson and Edna I. Knutson, his wife, are the owners of the lands patented to Mary G. McDonald under allotment No. 559, described as follows:

The Southeast Quarter of the Northwest Quarter and the Northeast Quarter of the Southwest Quarter, Section 16, Township 19, North, Range 19 West Montana Meridian.

That said defendants are using 40 inches of water on said 80 acres and the same is necessary and required to properly irrigate said 80 acres of land. Said appropriation was made through the McDonald-Deschamps Ditch as aforesaid.

(d) That P. W. Sorensen is the owner of the lands patented to Frank Fiddler under allotment No. 785, described as follows:

The West Half of the Southwest Quarter of Section 16, Township 19 North, Range 19 West, Montana Meridian.

That said defendant is using 50 inches of water on said 80 acres, and the same is necessary and re-

quired to properly irrigate said 80 acres of land. Said appropriation was made through the McDonald-Deschamps Ditch as aforesaid.

(e) That Avery A. Stevens is the owner of the lands patented to William Deschamps under allotment No. 781, described as follows:

The Southwest Quarter of the Northwest Quarter of Section 16, Township 19 North, Range 19 West Montana Meridian, and the Southeast Quarter of the Northeast Quarter of Section 17, Township 19 North, Range 19 West Montana Meridian.

That said defendant is using 40 inches of water on said 80 acres, and the same is necessary and required to properly [31] irrigate said 80 acres of land. Said appropriation was made through the McDonald-Deschamps Ditch as aforesaid.

Also, that Avery A. Stevens is the owner of the lands patented to Edward Deschamps under allotment No. 785, described as follows:

The North thirty acres of the Northeast Quarter of the Southeast Quarter, Section 17, Township 19, North, Range 19 West, Montana Meridian.

That said defendant is using 30 inches of water on said 30 acres, and the same is necessary and required to properly irrigate said 30 acres of land. Said appropriation was made through the McDonald-Deschamps Ditch as aforesaid.

(f) That Meil C. Pierce is the owner of the lands patented to Edward Deschamps under Allotment No. 785, described as follows:

The South 10 acres of the Northeast Quarter of the Southeast Quarter and the Southeast Quarter of the Southeast Quarter, Section 17, Township 19, North, Range 19 West Montana Meridian.

That said defendant is using 50 inches of water on said 50 acres, and the same is necessary and required to properly irrigate said 50 acres of land. Said appropriation was made through the McDonald-Deschamps Ditch as aforesaid.

(g) That Bert Lish is the owner of the lands patented to Ora Deschamps under allotment No. 784, described as follows:

The Southwest Quarter of the Southeast Quarter of Section 17, Township 19 North, Range 19 West Montana Meridian.

That said defendant is using 40 inches of water on said 40 acres, and the same is necessary and required to properly irrigate said 40 acres of land. Said appropriation was made through the McDonald-Deschamps Ditch as aforesaid. [32]

5. That said water so appropriated by each of the foregoing parties can be used upon all of the lands herein described.

6. That the following parties, defendants herein, are the owners of the lands in their control and pos-

session and the water from the Magee-Minesinger Ditch, to-wit:

(a) That John Minesinger and Ada B. Minesinger, his wife, are the owners of the lands patented to John Minesinger under allotment No. 690, described as follows:

The South Half of the Northwest Quarter of Section 17, Township 19 North, Range 19 West Montana Meridian.

That said defendants are using 80 inches of water on said 80 acres, and the same is necessary and required to properly irrigate said 80 acres of land. Said appropriation was made through the Magee-Minesinger Ditch as aforesaid.

(b) That Thomas Wald is the owner of the lands patented to James Waymack under allotment No. 689, described as follows:

The West Half of the Southwest Quarter of Section 17, Township 19 North, Range 19 West, Montana Meridian.

That said defendant is using 80 inches of water on said 80 acres, and the same is necessary and required to properly irrigate said 80 acres of land. Said appropriation was made through the Magee Minesinger Ditch as aforesaid.

Also, that Thomas Wald is the owner of the lands patented to Emma Magee under allotment No. 688, described as follows:

The East Half of the Southeast Quarter of Section 18, Township 19 North, Range 19 West, Montana Meridian. [33]

That said defendant is using 80 inches of water on said 80 acres, and the same is necessary and required to properly irrigate said 80 acres of land. Said appropriation was made through the Magee-Minesinger Ditch as aforesaid.

7. That these defendants are ready and willing at all times to place proper measuring devices in their several ditches so that the water received by each of them may be properly measured.

8. That the waters appropriated for the irrigation of the foregoing lands are sufficient to irrigate said lands, and is all the water that these defendants have been using for the irrigation of their lands, but that plaintiff has, from time to time, been charging these defendants with water from the Reclamation Service never used, and through ditches never dug, under the pretense that said lands require additional water from the Reclamation Service.

Wherefore, the following defendants pray that they be decreed to be the owners and entitled to use the water appropriated through the McDonald-Deschamps Ditch as follows:

To defendant B. W. Alexander	50 Inches
To defendants Theodore Knutson and Edna Knutson, his wife	40 Inches
To defendant P. W. Sorensen	50 Inches
To defendant Avery A. Stevens	70 Inches
To defendant Meil C. Pierce	50 Inches
To defendant Bert Lish	40 Inches
To defendants Beckwith Mercantile Company and John A. Hazel	50 Inches

And the following defendants pray that they be decreed to be the owners and entitled to use the water appropriated through the Magee-Minesinger Ditch as follows:

To defendants John Minesinger and

Ada I. Minesinger, his wife 80 Inches

To defendant Thomas Wald 160 Inches [34]

And that plaintiff be restrained from interfering with their said several rights, and from charging these defendants for the use of water never delivered and through ditches never dug, and that defendants have such other and further relief as shall appear to the Court proper, including the costs of these defendants herein expended.

ELMER E. HERSHEY

Attorney for these answering
defendants.

[Verification]

[Endorsed]: Filed September 23, 1936. C. R. Garlow, Clerk, U. S. District Court, District of Montana. [35]

Thereafter, on September 29th, 1936, Plaintiff's Reply to Answer was duly filed herein, in the words and figures following, to wit: [36]

[Title of District Court and Cause.]

REPLY

Comes now the plaintiff, and for reply to the further answer, and new matter set out therein of the defendants, B. W. Alexander, Beckwith Mercantile Company, a Montana Corporation, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorensen, Avery A. Stevens, Meil C. Pierce, Bert Lish, John Minesinger and Ada B. Minesinger, his wife, and Thomas Wald, admits, denies and alleges as follows, to-wit:

I.

Admits the allegations contained in Paragraph 1 of said further answer.

II.

Admits the enactment into law of the Act of Congress of April 23, 1904 (33 Stat. L. 302).

III.

Admits that said lands on the reservation and the lands described in plaintiff's bill of complaint are arid lands and require artificial irrigation in order to produce crops to the full extent of the soil thereof. Denies that generally one inch per acre is at all times necessary and required for the irrigation of said lands and that beneficial use is the measure of the right in the irrigation of said land.

Replying to the second paragraph of paragraph 3 of defendants' further answer, plaintiff denies that

the McDonald-Deschamps ditch was dug and constructed in May, 1905 with a carrying capacity of 500 inches or $12\frac{1}{2}$ cubic feet of water per second of time and denies that the Indian allottees who dug said ditch appropriated through said ditch sufficient water to irrigate [37] their lands in the amounts set forth in their further answer.

Plaintiff denies that the Magee-Minesinger ditch was dug and constructed in May 1905, with a carrying capacity of 600 inches or 15 cubic feet of water per second of time, and denies that the Indian allottees who dug said ditch appropriated through said ditch sufficient water to irrigate their lands in the amounts set forth in their further answer.

And in this connection, plaintiff alleges that in 1906 Joseph McDonald, William, Edward and Joseph Deschamps constructed a ditch diverting water from Post Creek at a point on the left bank in the Southeast quarter of the Northwest quarter of the Northeast quarter ($SE\frac{1}{4}$ $NW\frac{1}{4}$ $NE\frac{1}{4}$) of Section Ten (10), Township Nineteen (19) North, Range Nineteen (19), West, M. P. M. for the purpose of conveying water upon portions of the following allotments: Edward Deschamps, No. 783; Ora Deschamps, No. 784; William Deschamps, No. 781; Frank Fiddler, No. 785; Duncan McDonald, No. 561; Florence McDonald, No. 560; Mary C. McDonald, No. 559; that Caroline McKeever, in 1908, extended said ditch, described above, for the purpose of conveying water upon portions of the Caroline McKeever allotment No. 791. Plaintiff further

alleges that George Buckhouse, in 1907 and 1908, constructed a ditch diverting water from Post Creek at a point on the left bank in the Southeast quarter of the Northwest quarter of the Northeast quarter (SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$) of Section Ten (10), Township Nineteen (19) North, Range Nineteen (19) West M. P. M. for the purpose of conveying water upon portions of the John Minesinger allotment, No. 690, and the Julia Minesinger allotment, No. 691; that in 1908 A. D. Magee extended this ditch constructed by the said George Buckhouse for the purpose of conveying water upon portions of the Emma M. Magee allotment, No. [38] 688, and the James Waymack allotment, No. 689.

Admits that trust patents issued to each of said Indian allottees and thereafter fee patents were issued.

Denies each and every other allegation contained in paragraph 3 of said further answer, not herein specifically qualified or admitted.

IV.

Admits the defendants are the owners of the lands described in paragraph 4 of said further answer and that said defendants are diverting waters to said lands. Plaintiff denies the amounts of water being diverted for the reason that it is impossible to ascertain from the allegations therein contained whether said diversions are made continuously throughout the year or are limited to the irrigation season. Denies the duty of water as set out for the lands of said defendants.

V.

Denies each and every allegation contained in paragraph 5 of said further answer.

VI.

Admits the defendants are the owners of the lands described in paragraph 6 of said further answer and that said defendants are diverting waters to said lands. Plaintiff denies the amounts of water being diverted for the reason that it is impossible to ascertain from the allegations therein contained whether said diversions are made continuously throughout the year or are limited to the irrigation season. Denies the duty of water as set out for the lands of said defendants.

VII.

Denies each and every allegation contained in paragraphs 7 and 8 of said further answer. [39]

VIII.

Plaintiff denies, generally, each and every matter, thing and allegation contained in said further answer and in the new matter set out therein, not herein admitted, qualified or denied.

IX.

Plaintiff, replying to said answer as a whole and to each and every allegation of new matter or affirmative matter therein contained, denies, generally, each and every allegation of new or affirmative

matter therein contained not herein specifically admitted, qualified or denied.

Wherefore, the plaintiff having fully replied to the said answer and allegations therein contained, renews its prayer for the relief sought in plaintiff's bill of complaint or file herein.

JOHN B. TANSIL

United States Attorney for the
District of Montana.

KENNETH R. L. SIMMONS

District Counsel, U. S. I. I. S.,
Department of the Interior.

[Verification]

[Endorsed]: Filed September 29, 1936. C. R. Garlow, Clerk, U. S. District Court, District of Montana. [40]

Thereafter, on June 30, 1939, Motion to Intervene by Flathead Irrigation District, et al., was duly filed herein, in the words and figures following, to wit: [41]

[Title of District Court and Cause.]

MOTION TO INTERVENE

Comes now the Flathead Irrigation District, a Municipal Corporation of the State of Montana, and Dennis A. Dellwo, and move the court for leave to intervene in the above entitled action and to file the complaint in intervention and answer to bill of

complaint served herewith on the grounds and for the reasons as follows, to-wit:

I.

That the representation of the interveners' interests by the United States will be inadequate and the interveners will or may be bound by the judgment for the reasons: The Flathead Irrigation District will, under its repayment contract with the United States, succeed to the rights of the United States in and to the water distribution system of the Flathead Irrigation Project. The value of the said system is dependent solely upon the waters available for distribution through it. The intervener, Dellwo, is a user of water under the Flathead Irrigation Project and the amount of water which he receives is based upon the amount generally available for the Flathead Irrigation Project system. That the United States, as owner of said system, is conceding that certain purported awards made by the Secretary of the Interior to the defendants in this case are valid whereas said awards were made without the power of the Secretary of the Interior and are void. The United States will not assert the invalidity of said awards. That the recognition of said rights by the United States will deprive the Flathead Irrigation Project system of water to which it is lawfully entitled and will therefore deprive the users under the system of water to which they are entitled. [42]

II.

That the claims of the interveners involve common questions of both law and fact in that the Flathead Irrigation Project will ultimately succeed to all of the rights of the United States and that the intervener, Dellwo, as a water user, will get only a proportionate share of the water available for delivery by the United States. That, as the amount of water available for the United States is increased or diminished the water of the intervener, Dellwo, is increased or diminished, and that all of the questions of both law and fact involved are common to the rights of the United States, the Flathead Irrigation Project and the intervener, Dellwo.

Reference is hereby made to the complaint in intervention and answer to bill of complaint served herewith.

Dated this 8th day of May, 1939.

RUSSELL E. SMITH

Attorney for Interveners,
Flathead Irrigation District
and Dennis A. Dellwo.

[Endorsed]: Filed June 30, 1939. C. R. Garlow,
Clerk, U. S. Court, District of Montana. [43]

Thereafter, on July 18, 1939, Objections of Defendants to Complaint in Intervention & Motion to Intervene were duly filed herein, in the words and figures following, to wit: [44]

[Title of District Court and Cause.]

OBJECTIONS OF DEFENDANTS TO COMPLAINT IN INTERVENTION AND MOTION TO INTERVENE.

Come now the Defendants in the above entitled action and separately object to the motion of Flathead Irrigation District and Dennis A. Dellwo for leave of court to intervene in the above entitled action and object to the proposed complaint in intervention tendered by said Intervenor separately upon each and all of the grounds and reasons stated, as follows:

1. That said proposed complaint in intervention does not state facts sufficient to constitute a cause of action against the Plaintiff or against any of the Defendants in the above entitled action.

2. That said proposed complaint in intervention and said motion for leave to intervene do not state facts sufficient to show that said Intervenor have any right or interest which will or may be inadequately represented by the United States or that said Intervenor will or may be bound by the judgment entered in the above entitled action.

3. That said proposed complaint in intervention and said motion for leave to intervene do not state facts sufficient to show that a question of law or fact raised therein or in either of them is in common with any question of law or fact in the above entitled action.

4. That it affirmatively appears that from said proposed complaint in intervention and said motion

for leave to intervene if the said Intervenor have any interest in the controversy involved in the above entitled action, such interest is derived from and in privity with that of the Plaintiff, United States of America, is not greater than the interest of the Plaintiff and is subject to all of the rights and interests of each and all of the Defendants in and to the property and rights in controversy in the above entitled action. [45]

5. That said proposed complaint in intervention and said motion for leave to intervene do not state facts sufficient to show that the rights and interests of the Defendants in and to the waters of Post Creek, which are in controversy in the above entitled action, are within the Flathead Irrigation District or are within the watershed from which said Flathead Irrigation District properly and legally obtains or expects to obtain its water for irrigation of the lands of the members of said District, or properly and legally affects the rights of the Intervenor, or that the Intervenor, or either of them, have any right, title or interest by virtue of their repayment contract relied upon by them, or otherwise, to question or cause to be questioned the rights of the individual Defendants in the above entitled action, as between said Defendants and the Plaintiff, United States of America.

MURPHY & WHITLOCK,

Attorneys for Defendants.

[Endorsed]: Filed July 18, 1939. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.

[46]

Thereafter, on July 20, 1939, Order Allowing Intervention was duly entered herein, in the words and figures following, to wit: [47]

[Title of District Court and Cause.]

ORDER ALLOWING INTERVENTION.

The Motion of Flathead Irrigation District, a Corporation, and Dennis A. Dellwo, to intervene in the above entitled Cause came on regularly to be heard in open Court this 18th day of July, 1939, at 10 o'clock A.M., pursuant to an order of the Court served upon all parties to the action more than five days prior to said 18th day of July, 1939, the Plaintiff, United States of America, appeared by R. Lewis Brown, Assistant United States Attorney, the Defendants heretofore appearing to the complaint of the United States appeared by objections filed by Messrs. Murphy and Whitlock, who did not appear in person, and the movants, Flathead Irrigation District, a Corporation, and Dennis A. Dellwo appeared by Counsel Russell E. Smith; the Defendants, Bert Myers Nelson, John Ellis, J. A. McKeever and Axel Erickson did not appear,

Whereupon, the matter was argued by appearing Counsel and the Court being now fully advised in the premises,

It Is Ordered, that the Motion of the Flathead Irrigation District, a Corporation, and Dennis A. Dellwo, to intervene in the above entitled Cause be, and the same is, hereby granted, and the Clerk of

this Court is hereby ordered to file forthwith the complaint in Intervention heretofore lodged with him, copies of which were heretofore served upon all of the parties to this action, at the time of service of the Motion to Intervene.

It Is Further Ordered that the Plaintiff and the Defendants have twenty days after service of this Order within which to answer the complaint in Intervention filed here,

Done this 20th day of July, 1939.

JAMES H. BALDWIN,
Judge.

[Endorsed]: Filed and entered July 20, 1939.
C. R. Garlow, Clerk, U. S. District Court, District of Montana. [48]

Thereafter, on July 20th, 1939, Complaint in Intervention & Answer to Bill of Complaint was filed by the Intervenors herein, in the words and figures following, to wit: [49]

[Title of District Court and Cause.]

COMPLAINT IN INTERVENTION AND ANSWER TO BILL OF COMPLAINT.

Come now the interveners, pursuant to the order of court herein allowing intervention, and for cause of action allege:

I.

That Dennis A. Dellwo is the owner of the East Half of the Southwest Quarter (E $\frac{1}{2}$ SW $\frac{1}{4}$), of

Section Twenty-six (26), Township Twenty (20) North, Range Twenty-one (21) West, Lake County, Montana. That said land is situated within the boundaries of the Flathead Indian Reservation and is included within the Flathead Irrigation District. That the said Dennis A. Dellwo is the successor in interest of Margareta Gariepy, a Flathead Indian, and that the land above described was allotted by the United States and said Margareta Gariepy as an Indian ward of the United States, and was, subsequent to the issuance of a fee patent by the United States to said Margareta Gariepy, sold to said Dennis A. Dellwo.

II.

That the Beckwith Mercantile Company is a corporation organized and existing under and by virtue of the laws of the State of Montana.

III.

That by virtue of a treaty between the United States of America and the Confederated Tribes of Flathead, Kootenai, and Upper Pend d'Oreilles Indians, made July 16, 1855 (12 Stat. L. 975), ratified March 8, 1859, by the Senate of the United States and regularly proclaimed by the President of the United States April 15, 1859, said Confederated Tribes conveyed to the United States their rights in and to a large portion of the country then occupied and claimed by them, and the United States set aside and reserved for the exclusive use, benefit and occupancy [50] of said Confederated

Tribes, and as a general Indian Reservation, the lands described in said treaty. That at the said time the United States reserved for the benefit of the Indians the waters flowing within the confines of said Indian Reservation, and thereupon became trustee of said waters for said Indians. That in 1904 the United States adopted a policy looking to the ultimate irrigation of the lands on the said reservation through a central irrigation system and thereafter made surveys and plans for the purpose of providing the greatest possible use of the waters of said reservation and for the purpose of securing a just and equal distribution of the waters of said reservation. That in the year 1908, and prior to the issuance of any allotments in severalty to any of the Indians on the Flathead Reservation, and particularly to any of the defendants in this action, or any of the predecessors in interest of the defendants in this action, the United States, for the purpose of providing a system for the irrigation of the lands upon the Flathead Reservation, by Act of Congress (35 Stat. L. 70), appropriated \$50,000.00 of public moneys for preliminary plans, surveys and estimates of irrigating systems, to irrigate the lands allotted by the Act of Congress of April 23, 1904 (33 Stat. L. 302), and the unallotted and irrigable lands on the Flathead Reservation, and to begin construction of the same. That in the year 1908, and prior to the issuance of any allotments in severalty as aforesaid, the United States, by Act of Congress May 28,

1908 (35 Stat. L. 448), appropriated and reserved all the waters of the said Flathead Irrigation District for distribution under irrigation systems to be constructed by the United States and provided that all water rights on the Flathead Indian Reservation should be taken from systems of irrigation to be constructed by the [51] United States, and at the same time provided that the lands irrigable under the systems provided for which had been allotted to the Indians in severalty should be deemed to have a right to water without cost to said Indians for construction of said system (it being the then intention of the United States to use Indian funds for the construction of said system) but likewise provided that all lands allotted to Indians and all surplus unallotted lands should bear their pro rata share of the cost and operation and maintenance of the system under which said lands lay. That thereafter and pursuant to various Acts of Congress, and up until March 1, 1939, the United States expended in the construction of irrigation systems on the Flathead Indian Reservation the sum of \$8,173,801.14, and that the United States now owns and operates and is in control of the Flathead Irrigation Project. That the said Flathead Irrigation Project delivers water each year for the irrigation of more than 80,000 acres of land on said reservation, and that except for the water delivered by said project a large portion of said lands would be arid.

IV.

That by an order and decree of the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Lake, which was duly given, made and entered on the 26th day of August, 1926, the Flathead Irrigation District was duly created and established as an irrigation district under the laws of the State of Montana, and particularly those laws providing for the creation of irrigation districts for the purpose of cooperating with the United States in the construction of irrigation works and projects, and this district was duly organized and created pursuant to Acts of Congress of May 29, 1908, (35 Stat. L. 448), Act of May 10, 1926 (44 Stat. L. 464-466), January 12, 1927 (44 Stat. L. 945), [52] March 7, 1928 (45 Stat. L. 212-213), March 4, 1929 (45 Stat. L. 1574), March 4, 1929 (45 Stat. L. 1639-1640), and May 4, 1930 (46 Stat. L. 291), and other acts amendatory thereof and supplemental thereto. That all of the lands within the Flathead Irrigation District are lands within the Flathead Indian Reservation, and were and are lands within the Flathead Irrigation Project. That subsequently and on or about the 12th day of May, 1928, the Flathead Irrigation District entered into a certain repayment contract between said Flathead Irrigation District and the United States of America, which said repayment contract contained terms and provisions required to be incorporated therein by the aforesaid Acts of Congress,

and subsequently and on the 12th day of July, 1928, said repayment contract was, by a judgment and decree of the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Lake, duly given, made and entered on said date, duly confirmed, approved and ratified, and all proceedings in relations thereto duly confirmed, which decree became final, and that ever since the date aforesaid said repayment contract has been in full force and effect and this defendant has been under the obligation, and now is under the obligation, created thereby. That upon repayment by the said Flathead Irrigation District of the sum provided for in said repayment contract that portion of the Flathead Irrigation Project lying within and serving the lands within the Flathead Irrigation District will become the property of the Flathead Irrigation District.

V.

That under and pursuant to the aforesaid Acts of Congress, and the rules and regulations of the Secretary of the Interior relating to the Flathead Irrigation Project, the Flathead Irrigation District is required to collect from each of the landowners [53] within the said district using water a proportionate share of the cost of the operation and maintenance of the said Flathead Irrigation Project serving lands within the said district each year. That the intervener Dellwo, as a user of water from the Flathead Irrigation District and the Flathead

Irrigation Project, is required to pay to the Flathead Irrigation District each year his proportionate share of the operation and maintenance cost of said Flathead Irrigation Project; that such charges are so assessed and divided that each user of water within the said project pays operation and maintenance charges based upon the amount of lands irrigated by him from the said irrigation system.

VI.

That the Flathead Indian Reservation is a large reservation containing many thousands of acres of land. That streams course through the said reservation at various points therein. That the streams on the said reservation are relatively few, and are separated by large tracts of land in which there are no natural water courses. That for the economical irrigation of the greatest possible acreage upon the said reservation and in order to secure a just and equal distribution of the waters of said reservation, it was and is necessary that a central irrigation project be developed. That the irrigation of any great portion of the said reservation by means of private ditches privately owned and operated would be economically unfeasible, and that the only feasible method of irrigating the greatest possible number of acres of land on said reservation is through a system such as the Flathead Irrigation Project. That in the absence of a system such as the Flathead Irrigation Project system many thousands of acres of land would be and forever remain arid.

That the Flathead Irrigation Project is so designed to gather into a central collecting system all of the economically available waters of the said reservation to [54] store said waters so far as the same is economically possible, and to make available for irrigation by pumping waters which would not be otherwise available for the irrigation of any of the lands of the reservation. That said irrigation project is so designed and so constructed that the waters of the various streams, including Post Creek, coursing through the reservation are collected and distributed through a central irrigation system, and is so designed and constructed that use of water on one part of the said project system vitally affects the amount of water available for other parts of the project system. That as designed and constructed the said Flathead Project irrigation system does as nearly as possible provide a just and equal distribution of water to those securing water from and through said system. That the soil of the Flathead Indian Reservation is such and the climate of the Flathead Indian Reservation is such that the growth of crops without irrigation is not feasible, and that irrigation is required for the successful raising of crops thereon.

VII.

That at the time of the ratification of said treaty of July 16, 1855, and ever since said time continuing to the present, Post Creek was and is an existing, innavigable stream of water rising in the Mission mountains located on the Flathead Indian

Reservation in Montana, and flowing in a south-westerly direction through a well defined channel with natural banks, and in its natural course across lands of said reservation empties into Mission Creek at a point located within said reservation.

VIII.

That the defendant, B. W. Alexander, is in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana, formerly known as the Duncan McDonald Allotment No. 561: [55]

The East Half of the Northeast Quarter ($E\frac{1}{2} NE\frac{1}{4}$) of Section Sixteen (16), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

IX.

That the defendants, the Beckwith Mercantile Company, a Montana corporation, and John A. Hazel, are in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana, formerly known as the Florence McDonald Allotment No. 560:

The Southwest Quarter of the Northeast Quarter ($SW\frac{1}{4} NE\frac{1}{4}$), and the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4} SE\frac{1}{4}$), of Section Sixteen (16), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

X.

That the defendants, Theodore Knutson and Edna I. Knutson, his wife, are in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana, formerly known as the Mary C. McDonald Allotment No. 559:

The Southeast Quarter of the Northwest Quarter ($SE\frac{1}{4}$ $NW\frac{1}{4}$), and the Northeast Quarter of the Southwest Quarter ($NE\frac{1}{4}$ $SW\frac{1}{4}$), Section Sixteen (16), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

XI.

That the defendant, P. W. Sorensen, is in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana, formerly known as the Frank Fiddler Allotment No. 785:

The West Half of the Southwest Quarter ($W\frac{1}{2}$ $SW\frac{1}{4}$) of Section Sixteen (16) Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian. [56]

XII.

That the defendant, Avery A. Stevens, is in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana, formerly known as the William Deschamps Allotment No. 781:

The Southwest Quarter of the Northwest Quarter ($SW\frac{1}{4}$ $NW\frac{1}{4}$) of Section Sixteen

(16), Township Nineteen (19) West, Montana Principal Meridian, and the Southeast Quarter of the Northeast Quarter ($SW\frac{1}{4}$ $NE\frac{1}{4}$) of Section Seventeen (17), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

XIII.

That the defendants, Avery A. Stevens and Neil C. Pierce, are in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana, formerly known as the Edward Deschamps Allotment No. 783:

The East Half of the Southeast Quarter ($E\frac{1}{2}$ $SE\frac{1}{4}$) of Section Seventeen (17), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

XIV.

That the defendants, Bert Lish, Bert Myers Nelson and John Ellis, are in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana, formerly known as the Ora Deschamps Allotment No. 784:

The West Half of the Southeast Quarter ($W\frac{1}{2}$ $SE\frac{1}{4}$) of Section Seventeen (17), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

That the defendant, J. A. McKeever, is in control and possession of the following described lands lying within the Flathead Indian Reservation in Mon-

tana, formerly known as the Caroline McKeever Allotment No. 791:

The North Half of the Northwest Quarter ($N\frac{1}{2}$ $NW\frac{1}{4}$) of Section Twenty-one (21), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

[57]

XV.

That during the years 1935, 1936, 1937 and 1938, the defendants, B. W. Alexander, Beckwith Mercantile Company, a Montana corporation, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorensen, Avery A. Stevens, Neil C. Pierce, Bert Lish, Bert Myers Nelson, John Ellis and J. A. McKeever, and each of them, diverted from Post Creek through a private ditch known as the McDonald-Deschamps Ditch, for use on their lands a greater amount of water than their pro rata share of the natural flow of the waters of the reservation calculated on an irrigable acreage basis, and diverted a greater amount of natural flow of water per irrigable acre than was actually disbursed to those persons whose lands are included in the Flathead Irrigation District, and particularly the intervener Dellwo. That in taking such amounts of water the defendants have deprived the intervener Dellwo and other users under the Flathead Irrigation District of a portion of the water rightfully belonging to them. That none of the described lands of the defendants above named are within the Flathead

Irrigation Project and that none of said defendants have endeavored to bring said lands within said project.

XVI.

That the defendant, Axel Erickson, is in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana, formerly known as the Julia Minesinger Allotment No. 691:

The North Half of the Northwest Quarter ($N\frac{1}{2}$ NW $\frac{1}{4}$) of Section Seventeen (17), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

XVII.

That the defendants, John Minesinger and Ada B. Minesinger, his wife, are in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana, formerly known as the John Minesinger Allotment No. 690: [58]

The South Half of the Northwest Quarter ($S\frac{1}{2}$ NW $\frac{1}{4}$) of Section Seventeen (17), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

XVIII.

That the defendant, Thomas Wald, is in possession and control of the following described lands lying within the Flathead Indian Reservation in Montana, formerly known as the James Waymack Allotment No. 689:

The West Half of the Southwest Quarter ($W\frac{1}{2}$ $SW\frac{1}{4}$) of Section Seventeen (17), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

XIX.

That the defendant, Thomas Wald, is also in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana, formerly known as the Emma M. Magee Allotment No. 688:

The East Half of the Southeast Quarter ($E\frac{1}{2}$ $SE\frac{1}{4}$) of Section Eighteen (18), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

XX.

That during the years 1935, 1936, 1937 and 1938, the defendants, Axel Erickson, John Minesinger and Ada B. Minesinger, his wife, and Thomas Wald, and each of them, diverted from Post Creek through a private ditch known as the Magee-Minesinger Ditch, for use on their lands a greater amount of water than their pro rata share of the natural flow of the waters of the reservation calculated on an irrigable acreage basis, and diverted a greater amount of natural flow of water per irrigable acre than was actually disbursed to those persons whose lands are included in the Flathead Irrigation District, and particularly the intervener Dellwo. That in taking such amounts of water the defendants

have deprived the intervener Dellwo and other users under the Flathead Irrigation District of a portion of the water rightfully belonging to them. That none of the described lands of the defendants above named are within the Flathead Irrigation Project and that none of said defendants [59] have endeavored to bring said lands within said project.

XXI.

That the Secretary of the Interior, claiming to act under the laws of the United States relating to the Flathead Indian Reservation, purported to award and decree to the defendants certain water rights out of Post Creek for the lands owned by said defendants. That the Secretary purported to award to the said defendants the following amounts of water:

B. W. Alexander.....	2	acre	feet	per	annum	Total	33.6	acre	feet
Beckwith Mercantile Company and John									
A. Hazel	2	"	"	"	"	"	16.4	"	"
Theodore Knutson and Edna I. Knutson.....	2	"	"	"	"	"	6.4	"	"
P. W. Sorenson.....	2	"	"	"	"	"	36.6	"	"
Avery A. Stevens.....	2	"	"	"	"	"	33.2	"	"
Avery A. Stevens and Neil C. Pierce.....	2	"	"	"	"	"	20.6	"	"
Bert Lish, Bert Myers Nelson and John El- lis	2	"	"	"	"	"	28.2	"	"
J. A. McKeever.....	2	"	"	"	"	"	2.8	"	"
Axel Erickson	2	"	"	"	"	"	154.8	"	"

John Minesinger and Ada B. Minesinger...	2 acre feet per annum	Total 150.8 acre feet
Thomas Wald (James Waymack allotment)	2 " " " " " "	104.6 " "
Thomas Wald (Emma M. Magee allotment)	2 " " " " " "	160 " "

The Secretary of the Interior purported to give to said defendants the prior right to the use of the amounts of water as above set forth.

That the Secretary also purported to award a right which was fixed in amount and not dependent upon the flow of the streams within the reservation, but which allowed to said defendants, and each of them, the full extent of said right irrespective of the amount of water received by other persons owning lands within the [60] reservation.

XXII.

That the acts of the Secretary of the Interior in purporting to award said defendants the rights as above set forth, were wrongful and unlawful and in excess of the jurisdiction of the Secretary of the Interior, in that they violated the General Allotment Act, 25 U. S. C. A. 381, which provided that the Secretary should have power to make rules to procure a just and equal distribution of the waters of the Reservation and for the reason that any award of a private water right, which right is prior in time to the other rights on the said Reservation is not a just and equal distribution of the waters, but is an unjust and unequal distribution of the waters, in

that two acre feet per acre is in excess of the amount of natural flow of water generally delivered to other users on said reservation and particularly the intervenor Dellwo.

XXIII.

That the defendants, and each of them, have taken the amounts of water taken by them without regard to the officers in charge of the Flathead Irrigation Project, and have assumed to take such water as they deemed proper at such times and at such places as they deemed proper. That all of the users of water under the Flathead Irrigation District, including the intervenor Dellwo, are required to take their water from the central distributing system and required to take the same under the supervision of a Water Master appointed by the United States for the purpose of distributing the waters of said system. That by reason of the nature of said reservation and the natural distribution of the waters thereon the fact that the said defendants have taken said water without the consent of the said Water Master has made it impossible to determine the amounts of water which actually should be distributed to the intervenor Dellwo and to the other persons using water under the Flathead Irrigation Project within the Flathead Irrigation District. That the acts [61] of the defendants in taking water without the consent or knowledge of the Water Master have seriously interfered with the operation of said system and have resulted in a loss of water

which could be used and is needed for the irrigation of other reservation lands, all to the damage of the interveners herein.

XXIV.

That none of the said defendants, insofar as their lands are served by the Magee-Minesinger or McDonald-Deschamps ditches, are taking water under the supervision of the Secretary of the Interior but that all of the said defendants, insofar as they are irrigating lands from the said ditches, have taken and are taking water apart from the Flathead Irrigation Project and that the said defendants have not requested the delivery of water from the Flathead Irrigation Project for the lands served by said ditches.

XXV.

That the interveners have no plain, speedy or adequate remedy at law.

For Answer to the Bill of Complaint on File Herein, Intervenors Admit, Deny and Allege as Follows:

I.

Admit the allegations of Paragraphs I and II of said complaint.

II.

For answer to Paragraph III of said complaint, interveners admit that the United States, upon the establishment of the Flathead Indian Reservation, reserved for irrigation and other beneficial uses

the waters of said reservation and exempted from appropriation under territorial or state law or otherwise all of the waters of said reservation, including all of the waters of Post Creek which has its source and flows wholly within the boundaries of said reservation, but in this connection allege that the United States reserved said land, not as sole owner of the lands and waters thereon, but as trustee for the Flathead Tribe of Indians. [62]

III.

Admit the allegations of Paragraph IV of said bill of complaint.

IV.

Admit the allegations of Paragraph V of said bill of complaint.

V.

Admit the allegations of Paragraph VI of said bill of complaint.

VI.

For answer to Paragraph VII of said bill of complaint, interveners admit that the Secretary of the Interior, purporting to act pursuant to the Acts of Congress of June 21, 1906, and May 29, 1908, purported to recognize all early water right developments of the Indians and white settlers of the Flathead Indian Reservation in Montana which had been made prior to the year 1909. Admit that a committee appointed by the Secretary of the Interior made personal investigation on the ground of heard testimony and reviewed surveys made by

engineers of the United States Reclamation Service of each tract of land on the Flathead Indian Reservation in Montana where irrigation had been used and early water right developments made prior to the year 1909. Admit that on the 10th day of December, 1919, the Committee reported to the Secretary of the Interior and made certain recommendations in accordance with the instructions of the Secretary of the Interior. Admit that the report of the said Committee and its recommendations were approved by said Secretary on November 25, 1921, except that the Secretary of the Interior did not accept the report of said committee in respect to operation and maintenance charges on said reservation. Deny that the Secretary of the Interior acted pursuant to law or in accordance with instructions issued pursuant to law. [63]

VII.

Admit that the defendant, B. W. Alexander, is in control of the lands described in Paragraph VIII of said complaint. Admit that the Secretary of the Interior attempted to grant a valid and subsisting water right on Post Creek to Duncan McDonald Allotment No. 561, and in this connection allege that said purported action of the Secretary of the Interior was void in that it was beyond the authority of the Secretary of the Interior and in excess of his jurisdiction and directly contrary to the controlling acts of Congress, and deny that the said Duncan McDonald Allotment No. 561 has or is en-

titled to any water right by virtue of the award of said Secretary of the Interior.

VIII.

Admit that the defendants, Beckwith Mercantile Company, a Montana corporation, and John A. Hazel, are in control of the lands described in Paragraph IX of said complaint. Admit that the Secretary of the Interior attempted to grant a valid and subsisting water right on Post Creek to Florence McDonald Allotment No. 560, and in this connection allege that said purported action of the Secretary of the Interior was void in that it was beyond the authority of the Secretary of the Interior and in excess of his jurisdiction, and was directly contrary to the controlling Acts of Congress, and deny that the said Florence McDonald Allotment No. 560, has or is entitled to any water right by virtue of the award of said Secretary of the Interior.

IX.

Admit that the defendants, Theodore Knutson and Edna I. Knutson, his wife, are in control of the lands described in Paragraph X of said complaint. Admit that the Secretary of the Interior attempted to grant a valid and subsisting water right on Post Creek to Mary C. McDonald, Allotment No. 559, and in this connection allege that said purported action of the Secretary of the Interior was void in that it was beyond the authority of the Secretary of the Interior and in excess of his jurisdic-

tion, and was directly contrary to the controlling Acts of Congress, and [64] deny that the said Mary C. McDonald Allotment No. 559 has or is entitled to any water right by virtue of the award of said Secretary of the Interior.

X.

Admit that the defendant, P. W. Sorensen, is in control of the lands described in Paragraph XI of said complaint. Admit that the Secretary of the Interior attempted to grant a valid and subsisting water right on Post Creek to Frank Fiddler Allotment No. 785, and in this connection allege that said purported action of the Secretary of the Interior was void in that it was beyond the authority of the Secretary of the Interior and in excess of his jurisdiction, and was directly contrary to the controlling Acts of Congress, and deny that the said Frank Fiddler Allotment No. 785 has or is entitled to any water right by virtue of the award of said Secretary of the Interior.

XI.

Admit that the defendant, Avery A. Stevens, is in control of the lands described in Paragraph XII of said complaint. Admit that the Secretary of the Interior attempted to grant a valid and subsisting water right on Post Creek to William Deschamps Allotment No. 781, and in this connection allege that said purported action of the Secretary of the Interior was void in that it was beyond the author-

ity of the Secretary of the Interior and in excess of his jurisdiction, and was directly contrary to the controlling Acts of Congress, and deny that the said William Deschamps Allotment No. 781 has or is entitled to any water right by virtue of the award of said Secretary of the Interior.

XII.

Admit that the defendants, Avery A. Stevens and Neil C. Pierce, are in control of the lands described in Paragraph XIII of said complaint. Admit that the Secretary of the Interior [65] attempted to grant a valid and subsisting water right on Post Creek to Edward Deschamps Allotment No. 783, and in this connection allege that said purported action of the Secretary of the Interior was void in that it was beyond the authority of the Secretary of the Interior and in excess of his jurisdiction and was directly contrary to the controlling Acts of Congress, and deny that the said Edward Deschamps Allotment No. 783 has or is entitled to any water right by virtue of the award of said Secretary of the Interior.

XIII.

Admit that the defendants, Bert Lish, Bert Myers Nelson and John Ellis, are in control of the lands described in Paragraph XIV of said complaint. Admit that the Secretary of the Interior attempted to grant a valid and subsisting water right on Post Creek to Ora Deschamps Allotment No. 784, and in this connection allege that said purported action of

the Secretary of the Interior was void in that it was beyond the authority of the Secretary of the Interior and in excess of his jurisdiction and was directly contrary to the controlling Acts of Congress, and deny that the said Ora Deschamps Allotment No. 784 has or is entitled to any water right by virtue of the award of said Secretary of the Interior.

XIV.

Admit that the defendant, J. A. McKeever, is in control of the lands described in Paragraph XV of said complaint. Admit that the Secretary of the Interior attempted to grant a valid and subsisting water right on Post Cheek to Caroline McKeever Allotment No. 791, and in this connection allege that said purported action of the Secretary of the Interior was void in that it was beyond the authority of the Secretary of the Interior and in excess of his jurisdiction and was directly contrary to the controlling Acts of Congress, and deny that the said Caroline McKeever Allotment No. 791 has or is entitled to any water right by virtue of the award of [66] said Secretary of the Interior.

XV.

Admit that during the months of June, July, August and September of the irrigation season of the year 1935 said defendants, B. W. Alexander, Beckwith Mercantile Company, a Montana corporation, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorensen, Avery A. Ste-

vens, Neil C. Pierce, Bert Lish, Bert Myers Nelson and J. A. McKeever wrongfully and unlawfully diverted from Post Creek through a private ditch known as the McDonald-Deschamps Ditch 1,051.91 acre-feet of water. Admit that the defendants threatened to continue to unlawfully divert excessive amounts of the water of Post Creek and that unless enjoined and restrained will continue to so do. Deny that the said defendants were lawfully entitled to divert 166.8 acre-feet of water during the year 1935.

XVI.

Admit that the defendant, Axel Erickson, is in control of the lands described in Paragraph XVII of said complaint. Admit that the Secretary of the Interior attempted to grant a valid and subsisting water right on Post Creek to Julia Minesinger Allotment No. 691, and in this connection allege that said purported action of the Secretary of the Interior was void in that it was beyond the authority of the Secretary of the Interior and in excess of his jurisdiction, and was directly contrary to the controlling acts of Congress, and deny that the said Julia Minesinger Allotment No. 691 has or is entitled to any water right by virtue of the award of said Secretary of the Interior.

XVII.

Admit that the defendants, John Minesinger and Ada B. Minesinger, his wife, are in control of the lands described in Paragraph XVIII of said com-

plaint. Admit that the Secretary of the Interior attempted to grant a valid and subsisting water right on Post Creek to John Minesinger Allotment No. 690, and in this connection allege that said purported action of the [67] Secretary of the Interior was void in that it was beyond the authority of the Secretary of the Interior and in excess of his jurisdiction and was directly contrary to the controlling acts of Congress, and deny that the said John Minesinger Allotment No. 690 has or is entitled to any water right by virtue of the award of said Secretary of the Interior.

XVIII.

Admit that the defendant, Thomas Wald, is in control of the lands described in Paragraph XIX of said complaint. Admit that the Secretary of the Interior attempted to grant a valid and subsisting water right on Post Creek to James Waymack Allotment No. 689, and in this connection allege that said purported action of the Secretary of the Interior was void in that it was beyond the authority of the Secretary of the Interior and in excess of his jurisdiction and was directly contrary to the controlling Acts of Congress, and deny that the said James Waymack Allotment No. 689 has or is entitled to any water right by virtue of the award of said Secretary of the Interior.

XIX.

Admit that the defendant, Thomas Wald, is in control of the lands described in Paragraph XX of

said complaint. Admit that the Secretary of the Interior attempted to grant a valid and subsisting water right on Post Creek to Emma M. Magee Allotment No. 688, and in this connection allege that said purported action of the Secretary of the Interior was void in that it was beyond the authority of the Secretary of the Interior and in excess of his jurisdiction and was directly contrary to the controlling Acts of Congress, and deny that the said Emma M. Magee Allotment No. 688 has or is entitled to any water right by virtue of the award of said Secretary of the Interior.

XX.

Admit that during the months of June, July, August and September of the irrigation season of the year 1935, said defendants, Axel Erickson, John Minesinger and Ada B. Minesinger, his wife, and Thomas Wald, wrongfully and unlawfully diverted [68] from Post Creek through a private ditch known as the Magee-Minesinger Ditch, 2,180.9 acre-feet of water. Admit that the defendants threaten to continue to unlawfully divert that excessive amount of the waters of Post Creek, and that unless enjoined and restrained will continue to so do. Deny that the said defendants were lawfully entitled to divert 570.2 acre-feet of water during the year 1935.

XXI.

For answer to Paragraph XXII of said bill of complaint, defendants admit that the Secretary of the Interior promulgated certain rules and regula-

tions in respect to persons on the Flathead Indian Reservation using water under the decree of the Secretary of the Interior. Admit that the rules and regulations were of the kind and character set forth in said Paragraph XXII. In this connection deny that the Secretary of the Interior had power to make the decree referred to in said Paragraph XXII.

XXII.

Admit the allegations of Paragraphs XXIII and XXIV of said Complaint.

XXIII.

For answer to Paragraph XXV of said complaint, defendants admit the allegations thereof, but in this connection allege that the defendants do not have the right to divert the amounts of water allowed by the Secretary of the Interior as aforesaid.

XXIV.

For answer to Paragraph XXVI of said complaint, interveners admit the allegations thereof, but in this connection allege that the defendants, in diverting the amounts of water purported to be awarded by the Secretary of the Interior, have taken more water than they are by law allowed or entitled to take. [69]

XXV.

Admit the allegations in Paragraph XXVII and XXVIII of said complaint.

Wherefore, Interveners Pray:

I. That the defendants, and each of them, be enjoined and restrained from taking or diverting any water from Post Creek, or in the alternative,

II. That it be decreed that the said defendants have no right to the waters of Post Creek over and above the pro rata share of each of said defendants to all of the normal flow of the waters of the reservation calculated on irrigable acreage basis.

III. That said defendants, and each of them, be restrained from taking more than the pro rata share of water of each of said defendants, said share to be determined by calculating the entire available supply of normal flow of water for said reservation in acre feet and the entire irrigable acreage on said reservation to be served and dividing the former by the latter and multiplying the result by the number of irrigable acres in the lands of each of said defendants as described herein, and in conjunction with Paragraphs III of this prayer.

IV. That it be adjudicated and decreed that the defendants have no right to take said waters apart from the deliveries made to them by the agents of the United States in charge of said Flathead Irrigation Project, and that the said defendants be restrained from taking any water to which they may be entitled except as the same is delivered to them by the agents of the United States in charge of the Flathead Irrigation District.

V. For such other and further relief as may be just.

VI. For interveners' costs herein expended.

RUSSELL E. SMITH,

Missoula, Montana,

Attorney for Intervenors.

[Endorsed]: Filed July 20, 1939. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.

[70]

Thereafter, on July 31, 1939, the Answer of Plaintiff to Complaint in Intervention & Reply to Answer of Intervenors was duly filed herein, in the words and figures following, to wit: [71]

[Title of District Court and Cause.]

ANSWER OF PLAINTIFF, UNITED STATES
OF AMERICA TO COMPLAINT OF INTER-
VENERS, THE FLATHEAD IRRIGA-
TION DISTRICT AND DENNIS A.
DELLWO, AND REPLY TO ANSWER OF
INTERVENERS TO COMPLAINT OF
PLAINTIFF.

Comes now the United States of America, plain-
tiff in the above entitled action, and for its answer
to the complaint in intervention and for its reply to
the answer to its bill of complaint by the inter-
veners, Flathead Irrigation District, a corporation,
and Dennis A. Dellwo, on file herein, alleges:

I.

Plaintiff admits the allegations contained in paragraphs I and II of the complaint of the Interveners.

II.

Plaintiff admits the allegations contained in paragraph III of the interveners of the complaint from the beginning thereof to line 13, on page 3, paragraph III, of said complaint.

Plaintiff denies each and every allegation contained in said paragraph III, commencing with line 13 and ending with the word "United States" in line 21 on page 3, paragraph III, of said complaint.

Plaintiff admits the allegations contained from line 21 on page 3 of said complaint to the end of paragraph III, line 8, page 4 of said complaint.

III.

Plaintiff admits the allegations contained in paragraphs IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, and XIV of the interveners of the complaint.

IV.

Plaintiff admits the allegations contained in paragraph XV of the interveners of the complaint, but in relation to the matters set out in said paragraph, plaintiff alleges that [72] the said defendants, B. W. Alexander, Beckwith Mercantile Company, a Montana corporation, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorensen, Avery A. Stevens, Meil C. Pierce, Bert Lish, Bert

Myers Nelson, John Ellis and J. A. McKeever have during the months of June, July, August, and September of the irrigation season in the year 1935 wrongfully, and unlawfully diverted from Post Creek for the irrigation of their lands described in said complaint of interveners through a private ditch known as the McDonald-Deschamps Ditch, 1,051.91 acre feet of water; that said amount of water was diverted wrongfully and unlawfully and was in excess of the amount of water allocated said lands under decrees of the Secretary of the Interior of the United States of America made on November 25, 1921.

V.

Plaintiff admits the allegations contained in paragraphs XVI, XVII, XVIII and XIX of the interveners of the complaint.

VI.

Plaintiff admits the allegations contained in paragraph XX of the interveners of the complaint, but in relation to the matters therein set out in said paragraph, alleges that the said defendants, Axel Erickson, John Minesinger and Ada B. Minesinger, his wife, and Thomas Wald, have during the months of June, July, August, and September of the irrigation season in the year 1935 wrongfully and unlawfully diverted from Post Creek for the irrigation of their lands described in said complaint of interveners through a private ditch known as the

Magee-Minesinger Ditch, 2180.9 acre feet of water; that said amount of water was diverted wrongfully and unlawfully and was in excess of the amount of water allocated said lands under decrees of the Secretary of the Interior of the United States of America made on November 25, 1921. [73]

VII.

Plaintiff, answering paragraph XXI of the complaint of the interveners, alleges that the water rights set opposite the names of each defendant are true and correct, and alleges further that the Secretary of the Interior acted with authority of law in making such grants and awards to the defendants' predecessors and their lands involved herein, in pursuance to the authority vested in him by the acts of Congress of June 21, 1906 (34 Stat. 354) and May 29, 1908 (35 Stat. 448). Plaintiff denies each and every other allegation therein contained.

VIII.

Plaintiff denies each and every allegation contained in paragraph XXII of the interveners of the complaint.

IX.

Plaintiff admits the allegations contained in paragraphs XXIII, XXIV and XXV of the interveners of the complaint.

X.

Plaintiff admits the allegations contained in paragraph II of the answer of the interveners to plaintiff's bill of complaint on file herein.

XI.

Plaintiff, replying to paragraph VI of the *interveners* of the *answer* to plaintiff's complaint alleges that all acts done by the Secretary of the Interior in respect to the water rights involved herein were done in pursuance to law and in accordance with instructions issued pursuant to law.

XII.

Plaintiff, replying to the allegations contained in paragraphs VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXIII, and XXIV of the answer of the *interveners* to plaintiff's complaint, on file herein, alleges that all acts of the Secretary of the Interior in granting water [74] rights to each of the defendants' predecessors and their lands involved herein, were within the authority of the Secretary of the Interior, within his jurisdiction and done in pursuance to the Acts of Congress of June 21, 1906 (34 Stat. 354) and May 29, 1908 (35 Stat. 448).

XIII.

Plaintiff denies each and every allegation contained in the complaint in intervention of *interveners* and in the answer of *interveners* to the complaint of plaintiff, not herein specifically admitted, qualified, or denied.

Wherefore plaintiff, having fully answered the complaint of *interveners* and having fully replied to the answer of *interveners* to plaintiff's complaint,

the plaintiff, the United States of America, renews the prayer for relief fully set out and contained in the plaintiff's complaint against the said defendants on file herein.

JOHN B. TANSIL,

United States Attorney for
the District of Montana.

KENNETH R. L. SIMMONS,

District Counsel, U. S. I. I. S.,
Department of the Interior.

[Verification]

[Endorsed]: Filed July 31-1939. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.

[75]

Thereafter, on September 23, 1939, defendants filed their Motion to Dismiss the Complaint in Intervention herein, in the words and figures following, to wit: [76]

[Title of District Court and Cause.]

MOTION TO DISMISS COMPLAINT
IN INTERVENTION

Come Now the defendants B. W. Alexander, Beckwith Mercantile Company, a Montana Corporation, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorensen, Avery A. Stevens, Meil C. Pierce, Bert Lish, John Minesinger and Ada B. Minesinger, his wife, and Thomas Wald, and move the Court as follows:

1. To dismiss the Complaint in Intervention because the said Complaint fails to state a claim against these defendants, or either or any of them, upon which relief can be granted.

LLOYD I. WALLACE,

Polson, Montana,

Attorney for Moving

Defendants.

[Endorsed]: Filed Sept. 23-1939. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.

[77]

Thereafter, on October 23, 1939, a Praeceptum to Dismiss Complaint in Intervention as to Defendants J. A. McKeever, John Minesinger and Ada B. Minesinger was duly filed herein, in the words and figures following, to wit: [78]

[Title of District Court and Cause.]

PRAECEPTUM

To the Above Entitled Court:

Please dismiss the complaint in intervention in the above entitled action insofar as, and only insofar as the same relates to J. A. McKeever, John Minesinger and Ada B. Minesinger.

Dated this 23rd day of October, 1939.

RUSSELL E. SMITH,

Attorney for Intervenors.

[Endorsed]: Filed Oct. 23-1939. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.

[79]

Thereafter, on March 21, 1940, the Answer of Defendants to Complaint in Intervention was duly filed herein, in the words and figures following, to wit: [80]

[Title of District Court and Cause.]

JOINT AND SEVERAL ANSWER OF DEFENDANTS, BECKWITH MERCANTILE COMPANY, A MONTANA CORPORATION, JOHN A. HAZEL, THEODORE KNUTSON AND EDNA I. KNUTSON, HIS WIFE, P. W. SORENSON, AVERY A. STEVENS, MEIL C. PIERCE, BERT MYERS NELSON, AND THOMAS WALD, TO COMPLAINT IN INTERVENTION.

Come Now the defendants, Beckwith Mercantile Company, a Montana Corporation, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorenson, Avery A. Stevens, Meil C. Pierce, Bert Myers Nelson and Thomas Wald, and for their joint and several answer to the Complaint in Intervention on file herein, admit, deny and allege:

First Defense

I.

Allege that the said Complaint in Intervention fails to state a claim against these answering defendants, or either or any of them, upon which relief can be granted.

Second Defense

I.

Defendants deny that Dennis A. Dellwo is the owner of the land described in paragraph I of the Complaint in Intervention and deny that he is the successor in interest of Frederick Gariepy; admit the other allegations contained in said paragraph I.

II.

Admit the allegations contained in paragraph II.

III.

Admit that by virtue of the treaty made, ratified and proclaimed, as alleged in paragraph III, the Confederated Tribes of Flathead, Kootenai, and Upper Pend d'Oreille Indians conveyed to the United States their rights in and to a large portion of the country then occupied and claimed by them; deny that the United [81] States set aside and reserved the lands described in the treaty for the exclusive use, benefit and occupancy of the said Confederated Tribes; deny that the United States reserved the waters flowing within the confines of the former Flathead Indian Reserve; admit that the United States became trustee of said waters for the benefit of said Indians; allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of the adoption of a policy looking to the ultimate irrigation of the lands on said reserve through a central irrigation system, and the purpose of the mak-

ing of surveys and plans; admit that in 1908 Congress appropriated \$50,000.00 for the purposes stated therein and allege that the cost of said entire work was to be reimbursed from the proceeds of the sale of lands within said reserve; deny that the United States appropriated and reserved all or any of the waters of the said Flathead Irrigation District; deny that the United States or the Act of Congress (35 Stat. L. 448) provided that all water rights on the Flathead Indian Reservation should be taken from systems of irrigation to be constructed by the United States; admit that the Act of Congress of May 29, 1908, provided that the lands irrigable under the systems therein provided; which had been allotted to the Indians in severalty, should be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for construction of such irrigation systems; deny that said Act of Congress provided that all lands allotted to Indians and all surplus in allotted lands should bear their pro rata share of the cost and operation and maintenance of the system under which they lie; allege that they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph IV. [82]

IV.

Defendants admit that all of the lands within the Flathead Irrigation District were and are lands within the former Flathead Indian Reservation;

allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in paragraph IV.

V.

Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph V.

VI.

Admit that the former Flathead Indian Reservation was a large reserve containing many thousands of acres of land and that streams course through the same at various points; admit that the soil and climate of the former Flathead Indian Reservation are such that irrigation is required for the successful raising of crops thereon to the full extent thereof; allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in paragraph VI.

VII.

Admit the allegations contained in paragraph VII.

VIII.

Admit that the defendant, B. W. Alexander, is in control and possession of the land described in paragraph VIII, formerly known as the Duncan McDonald Allotment No. 561.

XVI.

Deny the allegations contained in paragraph XVI.

XVII.

Admit that the defendant, Ada B. Minesinger, is in possession and control of the land described in paragraph XVII, formerly known as the John Minesinger Allotment No. 690.

XVIII.

Admit that the defendant, Thomas Wald, is in possession and control of the land described in paragraph XVIII, formerly known as the James Waymack Allotment No. 689.

XIX

Admit that the defendant, Thomas Wald, is also in control and possession of the land described in paragraph XIX, formerly known as the Emma M. Magee Allotment No. 688.

XX.

Deny the allegations contained in paragraph XX.

XXI.

Deny the allegations contained in paragraphs XXI, XXII, XXIII, XXIV and XXV.

XXII.

Except as hereinbefore specifically admitted, qualified or denied, defendants deny each and every allegation, matter, statement and thing, and each

and every part and portion thereof, in said Complaint in Intervention contained. [85]

Third Defense

For a third and separate defense, these answering defendants allege:

I.

That on the 16th day of July, 1855, a treaty was made and entered into by and between the United States of America and the Confederated Tribes of Flathead, Kootenai and Upper Pend d'Oreille Indians, wherein and whereby the said Indians ceded, relinquished and conveyed to the United States all their right, title and interest in and to a large tract of land then occupied and claimed by them, reserving therefrom, however, the land described in Article 2 of said treaty as a general Indian reservation and for their own use and benefit and occupation; which said treaty was ratified by the Senate of the United States on March 8, 1859, and regularly proclaimed by the President of the United States on April 15, 1859, a copy of which treaty, marked "Exhibit A", is hereto attached, here referred to and by this reference made a part hereof, the same as though fully written out at this place.

II.

That shortly thereafter and pursuant to the terms of such treaty, said Indians removed to and settled upon such Flathead Indian Reservation and, in

keeping with the meaning and intent of said treaty, many of them began the selection of home sites and the building of homes thereon, the breaking and clearing of ground, the digging of ditches, the irrigating of parts of said lands and the raising of crops thereon, and have continued to irrigate such lands and cultivate the same to the present time.

III.

That the land embraced within the limits of the former [86] Flathead Indian Reservation were and are arid in character and require artificial irrigation in order to produce crops thereon to the full extent of the soil thereof, and that the lands of the defendants, hereinafter mentioned and described, generally require one inch per acre at all times for the proper irrigation thereof and the successful raising of crops thereon, and were and are capable of being irrigated from the waters of Post Creek located in said reservation; that under the said treaty of July 16, 1855, the waters within the Flathead Indian Reservation, including the waters of Post Creek, were reserved to the Indians for the equal benefit of the tribal members for irrigation and other purposes.

IV.

That on April 23, 1904, the Congress of the United States passed an Act (33 Stat. L. 302), providing for the survey and allotment of the lands embraced within the limits of the said Flathead Indian

Reservation in the State of Montana, under the Allotment Laws of the United States (Act of Feb. 8, 1887, as amended), and the sale and disposal of all surplus lands after allotment.

V.

That in the year 1908, Florence McDonald, Mary C. McDonald, Frank Fiddler, William Deschamps, Edward Deschamps, Oro Deschamps, James Waymack and Emma M. Magee, were members of the Flathead Confederated Tribe of Indians (or Nation) and were residing on the Flathead Indian Reservation.

VI.

That sometime prior to the time 1908, the Indians named in the preceding paragraph selected, pursuant to the said treaty and the aforesaid Acts of Congress, as their individual [87] allotments and on the 8th day of October, 1908, the United States, through its special allotting agent or agents, duly and regularly allotted to said Indians and as their individual property, the tracts of land so selected by them and described as follows, to-wit:

To Florence McDonald, No. 560:

The Southwest Quarter of the Northeast Quarter and the Northwest Quarter of the Southeast Quarter, Section Sixteen, Township Nineteen North, Range Nineteen West, M. P. M.

To Mary C. McDonald, No. 559:

The Southeast Quarter of the Northwest Quarter and the Northeast Quarter of the Southwest Quarter, Section Sixteen, Township Nineteen North, Range Nineteen West, M. P. M.

To Frank Fiddler, No. 785:

The West Half of the Southwest Quarter, Section Sixteen, Township Nineteen North, Range Nineteen West, M. P. M.

To William Deschamps, No. 781:

The Southwest Quarter of the Northwest Quarter, Section Sixteen; and the Southeast Quarter of the Northeast Quarter of Section Seventeen; Township Nineteen North, Range Nineteen West, M. P. M.

To Edward Deschamps, No. 783:

The East Half of the Southeast Quarter, Section Seventeen, Township Nineteen North, Range Nineteen West, M. P. M.

To Oro Deschamps, No. 784:

The West Half of the Southeast Quarter, Section Seventeen, Township Nineteen North, Range Nineteen West, M. P. M.

To James Waymack, No. 689:

The West Half of the Southwest Quarter, Section Seventeen, Township Nineteen North, Range Nineteen West, M. P. M.

To Emma M. Magee, No. 688:

The East Half of the Southeast Quarter
of Section Eighteen, Township Nineteen
North, Range Nineteen West, M. P. M.

VII.

That thereafter the United States, by fee simple patent, conveyed said allotted lands, together with all the rights, privileges, [88] immunities and appurtenances of whatsoever nature thereunto belonging, to said Flathead Indians, and to their heirs and assigns forever, the lands so conveyed to each of said Indians being the same tracts of land as were so allotted to him or her; that the said lands so allotted to Florence McDonald were so conveyed to her by patent, dated November 5, 1917; that the said lands so allotted to Mary C. McDonald were so conveyed to her by patent, dated November 17, 1915; that the said lands so allotted to Frank Fiddler were so conveyed to him by patent, dated September 2, 1925; that the said lands so allotted to William Deschamps were conveyed to Joseph Deschamps and Mary Rodgers Deschamps, as the heirs of William Deschamps, deceased, by patent, dated August 16, 1920; that the said lands so allotted to Edward Deschamps were so conveyed to him by patent, dated November 9, 1910; that the said lands so allotted to Oro Deschamps were so conveyed to Oro Deschamps Freeman (formerly Oro Deschamps) by patent, dated March 8, 1917; that the said lands so allotted to James Waymack were

so conveyed to him by patent, dated October 10, 1910; and that the lands so allotted to Emma M. Magee were so conveyed to her by patent, dated August 25, 1916.

VIII.

That on or about May 1, 1905, the said Florence McDonald, Mary C. McDonald, Frank Fiddler, William Deschamps, Edward Deschamps and Oro Deschamps, dug and constructed, or caused to be dug and constructed, what is known as the McDonald-Deschamps ditch, which ditch taps Post Creek on its left bank in Section Ten, Township Nineteen North, Range Nineteen West, M. P. M. for the purpose of diverting and conveying water from said Post Creek to irrigate the lands of said Indians, so selected by them and afterwards [89] allotted to them, and that said ditch so constructed by the predecessors in interest of these answering defendants was, at the time of its construction and ever since then has been and now is, of such size and grade as to carry the required amount of water to, over and upon said lands to properly irrigate the same; that ever since said date the predecessors in interest of the defendants, Beckwith Mercantile Company, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorenson, Avery A. Stevens, Meil C. Pierce, and Bert Myers Nelson, and the said defendants have continually and said defendants now are maintaining said ditch and diverting and conveying water through the same from

Post Creek and irrigating the irrigable areas of their respective lands with said waters.

IX.

That on or about the 1st day of May, 1906, the said James Waymack and Emma M. Magee dug and constructed, or caused to be dug and constructed, an extension to the ditch known as the Magee-Minesinger ditch which taps Post Creek on its left bank in Section Ten, Township Nineteen North, Range Nineteen West, M. P. M., for the purpose of diverting and conveying water from said Post Creek to irrigate the lands of said Indians, so selected by them and afterwards allotted to them, and that said ditch and the extension thereof so constructed by the predecessors in interest of these answering defendants was, at the time of its construction and ever since has been and now is, of such size and grade as to carry the required amount of water to, over and upon said lands to properly irrigate the same; that ever since said date the predecessors in interest of the defendant, Thomas Wald, and said defendant have continually, and the defendant, Thomas Wald, now is maintaining said ditch and diverting and conveying [90] water through the same from Post Creek and irrigating the irrigable portions of his said lands with said water.

X.

That when the said Indians dug and constructed the said ditches and diverted and applied water

from Post Creek to the irrigation of the lands so selected by them, and when the said lands were so allotted to said members of the Flathead Nation, as set forth herein, the waters of the Flathead Indian Reservation, including the waters of Post Creek, were reserved under the said treaty of 1855 to each individual Indian named in paragraph V of this affirmative defense, in such amount as is or might be needed for the beneficial use for each of the said Indians in irrigating the said lands so allotted to each of them, and for stock, domestic and other beneficial purposes. That thereupon each of said Indian allottees was vested with a right as of the date of said treaty (July 16, 1855) in the use of sufficient water to properly irrigate his or her irrigable land, and that each of said Indian allottees was vested with the rights incident to ownership of both the land and said waters, which right to said waters thereby became appurtenant to the land so allotted to each said Indian.

XI.

That after the lands described above were allotted to the Indians named and after the reserved waters became vested in each of said Indians, as hereinbefore set forth, and after the said waters became appurtenant to each specific tract of land, as hereinbefore described, and by mesne conveyances from said original patentees and their respective successors in interest, these answering defendants have

acquired by purchase the legal title to said lands, together with all the tenements, hereditaments [91] and appurtenances of whatsoever nature thereunto belonging or in anywise appertaining, on the dates and as follows:

The Florence McDonald Allotment No. 560 was conveyed to the Beckwith Mercantile Company, a corporation, by warranty deed, dated October 25, 1921, and that defendant, Beckwith Mercantile Company, contracted to sell said land on August 22, 1934, to Clarence L. McVey and that the defendant, John A. Hazel, is occupying said land as a tenant of said McVey.

The Mary C. McDonald Allotment No. 559 was conveyed to the defendants, Theodore Knutson and Edna I. Knutson, his wife, by a contract for deed, dated October 8, 1934;

That the Frank Fiddler Allotment No. 785 was conveyed to the defendant, P. W. Sorenson, by warranty deed, dated November 9, 1928;

That the William Deschamps Allotment No. 781 was conveyed to the defendant, Avery A. Stevens, by warranty deed, dated January 26, 1935;

That the North thirty acres of the Edward Deschamps allotment No. 783 were conveyed to the defendant, Avery A. Stevens, by warranty deed, dated October 4, 1931, and that the South fifty acres of said allotment were conveyed to the defendant, Meil C. Pierce, by warranty deed, dated May 21, 1935;

That the North forty acres of the Oro Deschamps Allotment No. 784 were conveyed to the defendant, Bert Myers Nelson, by warranty deed, dated October 14, 1926, and that the South forty acres of said allotment were conveyed to said defendant by warranty deed, dated April 7, 1939;

That the James Waymack Allotment No. 689 was conveyed to the defendant, Thomas Wald, by warranty deed, dated March 24, 1917;

That the Emma M. Magee Allotment No. 788 was conveyed to the defendant, Thomas Wald, by warranty deed, dated March 24, 1917; [92]

And that ever since then these answering defendants have been and now are the owners and in possession of said tracts of land, together with all rights, privileges, immunities, water rights, tenements, hereditaments and appurtenances thereunto belonging.

XII.

That because of the foregoing facts these answering defendants are entitled to the use of a sufficient amount of water from Post Creek to properly irrigate their respective lands to the same extent as the individual Indians herein mentioned, predecessors in interest of these answering defendants, would be entitled under said treaty of July 16, 1855, if they had not conveyed said lands, together with the tenements, hereditaments and appurtenances thereunto belonging, to these answering defendants, and are equally entitled to the right to

use said waters as if they were members of the Flathead Nation and are entitled to use a sufficient amount of said water to properly irrigate their lands without hindrance or interference by the plaintiff or interveners, or either of them, or their agents and servants, and that they are entitled to use such waters whether their lands are under a Government ditch or not.

XIII.

These answering defendants are informed and believe and upon such information and belief state, that at the time of the making of the said treaty of 1855, there was, every since has been and now is, a supply of water available on the former Flathead Indian Reservation, sufficient to properly irrigate all the irrigable lands selected by and allotted to the Indians in severalty, upon the said Flathead Indian Reservation pursuant to the Act of Congress of April 23, 1904, as amended. [93]

Fourth Defense

For a fourth and separate defense, these answering defendants allege:

I.

That if the Secretary of the Interior acted erroneously under the Act of May 29, 1908, or any other Act of Congress, in recognizing the early private water rights of the Indian members of the Flathead Nation, or that if the said Secretary of the Interior

acted erroneously in determining or allocating water rights to said Indians, or to the lands described in the Complaint in Intervention, the only error committed by said Secretary of the Interior was and is that he ought to and should have recognized, determined or allocated water rights to the whole irrigable area of each Indian allotment in an amount as may be required to properly irrigate such lands.

Fifth Defense

For a fifth and separate defense, these answering defendants allege:

I.

These answering defendants here repeat and allege all of the matters, facts and things set forth and alleged in paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X and XI of their "Third Defense" and above set forth and alleged in this Answer, and pray that the same be taken and deemed a part of this "Fifth Defense" the same as though herein set out and alleged at length.

II.

And that ever since the construction of said McDonald-Deschamps and Magee-Minesinger ditches, and for more than ten years immediately preceding the filing of the Complaint in Intervention, these answering defendants, and each of them, and their respective grantors and their predecessors in interest, have main- [94] tained and used said ditches

during all of said time, have diverted and used said waters from Post Creek for irrigation and other domestic purposes upon their respective lands, continuously, openly, notoriously, peaceably, uninterruptedly, under claim of right (as their own) and adversely to the said interveners and their grantors and predecessors, and to all the world; and during all said times these answering defendants and their respective grantors and predecessors in interest have been, and these defendants now are, as to their said respective lands, the owners of the right so to maintain and use said ditches and to divert and use a sufficient amount of the waters of Post Creek to properly irrigate their respective lands, as a perpetual easement appurtenant to their said lands.

Wherefore, these answering defendants pray:

(1) That the Complaint in Intervention be dismissed and that said interveners take nothing thereby.

(2) That it be adjudged and decreed that these answering defendants, and each of them, are the owners of and entitled to the use of the McDonald-Deschamps and Magee-Minesinger ditches and that they and each of them are the owners of and entitled to divert, convey and use the waters of Post Creek for irrigation and other domestic purposes, in an amount sufficient to properly irrigate the full irrigable area of their respective lands to the full extent of the soil thereof.

(3) For such other and further relief as may be just.

(4) For their costs and disbursements herein expended.

LLOYD I. WALLACE

Polson, Montana

Attorney for Answering Defendants.

(Verification) [95]

EXHIBIT "A"

TREATY WITH THE FLATHEADS, ETC. 1855

Articles of agreement and convention made and concluded at the treaty-ground at Hell Gate, in the Bitter Root Valley, this sixteenth day of July, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned chiefs, head-men and delegates of the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, on behalf of and acting for said confederated tribes, and being duly authorized thereto by them. It being understood and agreed that the said confederated tribes do hereby constitute a nation, under the name of the Flathead Nation, with Victor, the head chief of the Flathead tribe, as the head chief of the said nation, and that the several chiefs, head-men, and delegates, whose names are signed to this treaty, do hereby, in behalf of their respective tribes, recognize Victor, as said head chief.

Article 1. The said confederated tribe of Indians hereby cede, relinquish, and convey to the United States all their rights, title, and interest in and to the country occupied or claimed by them, bounded and described as follows, to wit:

Commencing on the main ridge of the Rocky Mountains at the forty-ninth (49) parallel of latitude, thence westerly on that parallel to the divide between the Flat-bow or Kootenai river and Clarke's Fork, thence southerly and southeasterly along said divide to the one hundred and fifteenth degree of longitude, (115°), thence in a southwesterly direction to the divide between the sources of the St. Regis Borgia and the Coeur d'Alene rivers, thence southeasterly and southerly along the main ridge of the Bitter Root Mountains to the divide between the headwaters of the Koos-koos-kee river and of the southwestern fork of the Bitter Root River, thence easterly along the divide separating the waters of the several tributaries of the Bitter Root river from the waters flowing [96] into the Salmon and Snake rivers to the main ridge of the Rocky Mountains, and thence northerly along the said main ridge to the place of beginning.

Article 2. There is, however, reserved from the lands above ceded, for the use and occupation of the said confederated tribes, and as a general indian reservation, upon which may be placed other friendly tribes and bands of Indians of the Territory of Washington who may agree to be consolidated with the tribes parties to this treaty, under

the common designation of the Flathead Nation, with Victor, head chief of the Flathead tribe, as the head chief of the nation, the tract of land included within the following boundaries, to wit:

Commencing at the source of the main branch of the Jocko River, thence along the divide separating the waters flowing into the Bitter Root river from those flowing into the Jocko to a point on Clarke's Fork between the Camash and Horse prairies; thence northerly to and along the divide bounding on the west the Flathead river to a point due west from the point half-way in latitude between the northern and southern extremities of Flathead lake; thence on a due east course to the divide whence the Crow, the Prune, the So-ni-el-em and the Jocko rivers take their rise, and thence southerly along said divide to the place of beginning.

All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the confederated tribes, and the Superintendent and agent. And the said confederated tribes agree to remove to and settle upon the same within one year after the ratification of this treaty. In the meantime [97] it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the

United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant.

Guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named. And provided, that any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President of the United States, and payment made therefor in money, or improvements of an equal value be made for said Indian upon the reservation; and no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money or improvements of an equal value shall be furnished him as aforesaid.

Article 3. And provided, that if necessary for the public convenience roads may be run through the said reservation; and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them, as also the right in common with citizens of the United States to travel upon all public highways.

The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed

places in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Article 4. In consideration of the above cession, the United States agrees to pay to the said confederated tribes of Indians, [98] in addition to the goods and provisions distributed to them at the time of signing this treaty the sum of One Hundred and Twenty Thousand Dollars in the following manner—that is to say: for the first year after the ratification hereof, thirty-six thousand dollars, to be expended under the direction of the President, in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, and for such other objects as he may deem necessary. For the next four years, six thousand dollars each year; for the next five years, five thousand dollars each year; for the next five years, four thousand dollars each year; and for the next five years, three thousand dollars each year.

All which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them. and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

Article 5. The United States further agree to establish at suitable points within the said reservation, within one year after the ratification hereof, an agricultural and industrial school, erecting the necessary buildings, keeping the same in repair, and providing it with furniture, books, and stationery, to be located at the agency, and to be free to the children of the said tribes. and to employ a suitable instructor or instructors. To furnish one blacksmith shop, to which shall be attached a tin and gun shop; one carpenter's shop; one wagon and ploughmaker's shop; and to keep the same in repair; and furnished with the necessary tools. To employ two farmers, one blacksmith, one tinner, one gunsmith, one carpenter, one wagon and plough maker for the instruction of the Indians in trades, and to assist [99] them in the same. To erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures. and to employ two millers. To erect a hospital, keeping the same in repair, and provided with the necessary medicines and furniture. and to employ a physician: and to erect, keep in repair, and provide the necessary furniture the buildings required for the accommodation of said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chiefs of the said confederated tribes of Indians are expected

and will be called upon to perform many services of a public character, occupying much of their time, the United States further agrees to pay to each of the Flathead, Kootenay, and Upper Pend d'Oreilles tribes five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such persons as the said confederated tribes may select to be their head chiefs, and to build for them at suitable points on the reservation a comfortable house, and properly furnish the same, and to plough and fence for each of them ten acres of land. The salary to be paid to, and the said houses to be occupied by, such head chiefs so long as they may be elected to that position by their tribes, and no longer.

And all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said tribes. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

Article 6. The President may from time to time, at his discretion, cause the whole, or such portion of such reservation as he may think proper, to be surveyed into lots, and assign the [100] same to such individuals or families of the said confederated tribes as are willing to avail themselves of the privilege, and will locate on the same as a permanent home; on the same terms and subject to the

same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

Article 7. The annuities of the aforesaid confederated tribes of Indians shall not be taken to pay the debts of individuals.

Article 8. The aforesaid confederated tribes of Indians, acknowledge their dependence upon the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or, in default thereof, or if injured or destroyed, compensation may be made by the government out of the annuities. Nor will they make war upon any other tribe except in self defense, but will submit all matters of difference between them and other Indians to the government of the United States or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the jurisdiction of the United States, the same rule shall prevail as that prescribed in this article, in case of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

Article 9. The said confederated tribes desire to exclude from their reservation the use of ardent

spirits, and to prevent their people from drinking the same; and therefore it is provided that any Indian belonging to said confederated tribes of Indians who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities [101] withheld from him or her for such time as the President may determine.

Article 10. The United States further agree to guarantee the exclusive use of the reservation provided for in this treaty, as against any claims which made be urged by the Hudson Bay Company under the provisions of the treaty between the United States and Great Britain of the fifteenth of June, eighteen hundred and forty-six, in consequence of the occupation of a trading post on the Pru-in river by the servants of that company.

Article 11. It is, moreover, provided that the Bitter Root Valley, above the Loo-lo Fork, shall be carefully surveyed and examined, and if it shall prove, in the judgment of the President, to be better adapted to the wants of the Flathead tribe than the general reservation provided for in treaty, then such portions of it as may be necessary shall be set apart as a separate reservation for the said tribe. No portion of the Bitter Root Valley, above the Loo-lo Fork, shall be opened to settlement until such examination is had and the decision of the President made known.

Article 12. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the undersigned head chiefs, chiefs, and principal men of the Flathead, Kootenay and Upper Pend d'Oreilles tribes of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, (L.S.)
Governor and Superintendent Indian
Affairs, W.T.

VICTOR,

head chief of the Flathead Nation,

his X mark (L.S.)

ALEXANDER,

chief of the Upper Pend d'Oreilles,

his X mark (L.S.)

MICHELLE,

chief of the Kootenays,

his X mark (L.S.) [102]

AMBROSE,

his X mark (L.S.)

PAH-SOH,

his X mark (L.S.)

BEAR TRACK,

his X mark (L.S.)

ADOLPHE,

his X mark (L.S.)

THUNDER,

his X mark (L.S.)

BIG CANOE,

his X mark (L.S.)

KOOTEL CHAH,

his X mark (L.S.)

PAUL,

his X mark (L.S.)

ANDREW,

his X mark (L.S.)

MICHELLE,

his X mark (L.S.)

BATTISTE,

his X mark (L.S.)

KOOTENAYS

GUN FLINT,

his X mark (L.S.)

LITTLE MICHELLE,

his X mark (L.S.)

PAUL SEE,

his X mark (L.S.)

MOSES,

his X mark (L.S.)

JAMES DOTY,

Secretary.

R. H. LANSDALE,

Indian Agent.

W. H. TAPPAN,

Sub. Indian Agent

HENRY R. CROSIRE,
GUSTAVUS SOHON,
Flathead Interpreter.
A. J. HOECKEN,
sp. mis.
WILLIAM CRAIG.

[Endorsed]: Filed March 21, 1940. C. R. Garlow, Clerk, U. S. District Court, District of Montana. [103]

Thereafter, on April 15, 1940, the Interveners' Reply to defendants' Answer to Complaint in Intervention was duly filed herein, in the words and figures following, to wit: [104]

REPLY OF INTERVENERS, FLATHEAD IRRIGATION DISTRICT AND DENNIS A. DELLWO TO JOINT AND SEVERAL ANSWERS OF BECKWITH MERCANTILE COMPANY, A MONTANA CORPORATION, JOHN A. HAZEL, THEODORE KNUTSON, EDNA I. KNUTSON, P. W. SORENSON, AVERY A. STEVENS, MEIL C. PIERCE, BERT MYERS NELSON, AND THOMAS WALD, TO COMPLAINT IN INTERVENTION.

Come now the interveners above named and for reply to the joint and several answers of the defendants on file herein, admit, deny and allege as follows:

For Reply to the Third Defense:

I.

Admit the allegations of Paragraph I of the third defense.

II.

Admit that shortly after the ratification of the treaty many of said Indians removed to and settled upon the Flathead Indian Reservation. Interveners are without any knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph II of said third defense.

III.

Admit that the land embraced within the limits of the former Flathead Indian Reservation were and are arid in character and require artificial irrigation in order to produce crops thereon to the full extent of the soil thereof. Admit that the lands of the defendants are capable of being irrigated from the waters of Post Creek, located on said reservation. Admit that under the treaty of July 16, 1855, the waters within the Flathead Indian Reservation were reserved for the benefit of the Confederate Tribes of Indians to be located on the Flathead Indian Reservation, but in this connection allege that such reservation was made for the benefit of the Indians as a tribe and not to the individual members thereof. Deny that the lands of the defendants require one inch per acre for the proper irrigation thereof.

IV.

Admit the allegations of Paragraph IV of said third defense.

V.

Admit the allegations of Paragraph V of said third defense.

VI.

Admit that on the 8th day of October, 1908, the Indians named in Paragraph V of said answer were allotted the tracts of land described in said Paragraph VI of said answer. Allege that the interveners do not have sufficient knowledge or information to form a belief as to the truth of the allegations with respect to the dates of the selection of the said allotments, and in this connection allege that no ownership in severalty in any of the Indians or persons mentioned in Paragraph VI of said third defense occurred until the date of the allotment, to-wit: October 8, 1908.

VII.

Admit that the United States subsequently by fee simple patent conveyed said allotted lands unto the Flathead Indians or their heirs. Allege that the interveners do not have sufficient knowledge or information to form a belief with respect to the remaining allegations of Paragraph VII of said third defense.

VIII.

Admit that some person or persons unknown to

interveners dug and constructed what is known as the McDonald-Deschamps ditch, which ditch taps Post Creek on its left bank in Section Ten (10), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian, for the purpose of diverting and conveying water from Post Creek to the lands of said person or persons unknown.

Admit that ever since 1935 the defendants, Beckwith Mercantile Company, John A. Hazel, Theodore Knutson, Edna I. Knutson, his wife, P. W. Sorenson, Avery A. Stevens, Meil C. Pierce and Bert Myers Nelson have diverted water from Post Creek through and by means of [106] said ditch for the irrigation of their lands.

Allege that the interveners do not have knowledge or information sufficient to form a belief as to the truth of the allegations with respect to the names of the persons who dug said ditch or the date of the digging thereof, and whether or not the lands selected by the said persons were the lands thereafter allotted to them, or as to the size of said ditch and as to the length of time of the use thereof.

IX.

Admit that some person or persons unknown to interveners dug and constructed what is known as the Magee-Minesinger ditch, which ditch taps Post Creek on its left bank in Section Ten, Township Nineteen North, Range Nineteen West, M.P.M.,

for the purpose of diverting and conveying water from Post Creek to the lands of said person or persons unknown.

Admit that ever since 1935 the defendant, Thomas Wald, has diverted water from Post Creek through and by means of said ditch for the irrigation of his lands.

Allege that the interveners do not have knowledge or information sufficient to form a belief as to the truth of the allegations with respect to the names of the persons who dug said ditch or the date of the digging thereof, and whether or not the lands selected by the said persons were the lands thereafter allotted to them, or as to the size of said ditch and as to the length of time of the use thereof.

X.

Deny each and every allegation, matter and thing contained in Paragraph X of said third defense.

XI.

Admit that the Indians described in Paragraph XI of said third defense transferred their lands to the defendants named in [107] said paragraph. Allege that interveners have not sufficient knowledge or information to form a belief as to the truth of the allegations of said paragraph concerning the dates of said conveyances. Specifically deny that the said waters became appurtenant to said lands.

XII.

Deny each and every allegation, matter and thing contained in Paragraph XII of said third defense.

XIII.

Deny each and every allegation, matter and thing contained in Paragraph XIII of said third defense.

For reply to the fourth defense:

I.

Deny that the Secretary of the Interior committed error in not recognizing, determining or allocating water rights to the whole irrigable acreage of each Indian allotment in an amount as may be required to properly irrigate such lands.

For reply to the fifth defense:

I.

Intervenors reply to each and every paragraph contained in Paragraph I of said fifth defense in the same manner as said paragraphs are admitted, denied or qualified in the reply to the third defense.

II.

Allege that intervenors do not have sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph II of said fifth defense.

Wherefore, having fully replied to defendants' answer, interveners pray for the relief demanded in their complaint.

RUSSELL E. SMITH

Attorney for Intervenors.

[Endorsed]: Filed April 5, 1940. C. R. Garlow, Clerk, U. S. District Court, District of Montana.

[108]

Thereafter, on July 31, 1941, the Court's Findings of Fact, Conclusions of Law & Order were duly filed herein, in the words and figures following, to wit: [109]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On May 6, 1940, this cause came duly and regularly on for trial before the Court, sitting without a jury, at Missoula, Montana, on the issues joined by the Amended Complaint and the Amended Answer thereto and the Complaint in Intervention and the Answers thereto. The Plaintiff was represented by the Honorable John B. Tansil, Attorney of the United States for the District of Montana, and the Honorable Kenneth R. L. Simmons, District Counsel, Indian Service; the Defendants were represented by Mr. Lloyd I. Wallace, and the Intervenors by Mr. Russell E. Smith. The taking of testimony was begun, and not being concluded on

that day the further trial of the case was continued from day to day thereafter until May 8, 1940, at which time the taking of testimony was concluded, and the parties plaintiff, defendant and intervener asked for and were by the Court granted time to file briefs herein, and it was ordered that a transcript of the testimony taken and the proceedings had at the trial be furnished for the use of the Court. Briefs were filed by the respective parties plaintiff, defendant and intervener within the time allowed by the Court, the last thereof being filed on July 6, 1940, and transcript of the testimony taken and proceedings had at the trial of the case was furnished to the Court as [110] directed, and thereupon the cause was by the Court taken under advisement.

After due consideration and study the Court finds the facts to be as follows:

FINDINGS OF FACT

1: At the time the bill of complaint was filed herein on April 23, 1936, the defendants B. W. Alexander, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorensen, Avery A. Stevens, Meil C. Pierce, Bert Lish, Bert Myers Nelson, John Ellis, J. A. McKeever, Axel Erickson, John Minesinger and Ada B. Minesinger, his wife, and Thomas Wald were, and ever since have been, citizens of the United States of America and of the State of Montana residing within the confines of the

Flathead Indian Reservation in the State and District of Montana;

2: At the time the bill of complaint was filed herein, as aforesaid, the defendant Beckwith Mercantile Company was, and ever since then it has been, a corporation created, organized and existing under and by virtue of the laws of the State of Montana;

3: That by virtue of a treaty made and concluded at the Treaty Grounds at Hellgate in the Bitter Root Valley on July 16, 1855, and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and certain chiefs, head-men and delegates of the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, on behalf of and acting for said confederated tribes, it was understood and agreed that the said confederated tribes do hereby constitute a nation, with the name of the Flathead Nation, with Victor, the head chief of the Flathead tribe, as the head chief of said nation, and that the several chiefs, head-men and delegates whose names are signed to this treaty do hereby, in behalf of their respective tribes, recognize Victor as said head chief;

[111]

4: This treaty was ratified by the Senate of the United States on March 8, 1859, and the same was legally proclaimed by the President of the United States on April 18th that year;

5: Among ohter things, it is provided in said treaty, so made and concluded, ratified and proclaimed as aforesaid, as follows, to-wit:

Article 1. The said confederated tribes of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them, within certain limits specifically described;

Article 2. There is, however, reserved from the lands above ceded for the use and occupation of the said confederated tribes and as a general Indian reservation upon which may be placed other friendly tribes and bands of Indians of the Territory of Washington who may agree to be consolidated with the tribes party to this treaty, under the common designation of the Flathead Nation, with Victor, head chief of the Flathead tribe, as the head chief of the nation, the tract of land included within the following boundaries, to-wit: (Here these lands are specifically described.) All of which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the confederated tribes and the superintendent and agent. And the said confederated tribes agree to remove to and settle upon the same within one year after the ratification of the treaty. * * *

Article 3. * * *

Article 4. In consideration of the above cession, the United States agrees to pay to said confederated tribes of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty, the sum of one hundred [112] and twenty thousand dollars, in the following manner—that is to say: For the first year after the ratification hereof; thirty-six thousand dollars, to be expended under the direction of the President, in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, and for such other objects as he may deem necessary. For the next four years, six thousand dollars each year; for the next five years, five thousand dollars each year; for the next five years, four thousand dollars each year; and for the next five years, three thousand dollars each year. All of which said sums of money shall be applied to the use and benefit of the Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them, and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

Article 5. The United States further agrees to establish at suitable points within said reservation, within one year after the ratification hereof, an agricultural and industrial school, * * *. To furnish one blacksmith shop, to which shall be attached a

tin and gun shop; one carpenter's shop; one wagon and ploughmaker's shop, and to keep the same in repair, and furnished with the necessary tools. To employ two farmers, one blacksmith, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades, and to assist them in the same. * * *.

Article 6. The President may from time to time, at his discretion, cause the whole, or such portion of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. [113]

* * * * *

Article 12. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

(12 Stat. 975.)

6: The Sixth Article of the Treaty with the Omahas provides as follows:

“The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof,

as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one quarter section; to each family of three and not exceeding five, one half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President, may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President [114] may, if the patent shall have been issued, cancel the assignment, and may also

withhold from such person, or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit under such laws, rules or regulations, as may hereafter be prescribed by the Congress or President of the United States. No State Legislature shall remove the restrictions herein provided for, without the consent of Congress."

7: Ever since April 8, 1859, the lands specifically described in Article 2 of the treaty made and concluded at the Treaty Grounds at Hellgate in the Bitter Root Valley July 16, 1855, as aforesaid, has been, and the same is now, an Indian Reservation subject to the right of the Flathead Nation, and at all times since April 8, 1859, said land has been, and it now is, occupied and inhabited by the Indians of said Flathead Nation;

8: By section 1 of the Act of February 8, 1887, 24 Stat. 388, 25 U.S.C.A. S 331 and note, it was provided: "That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, * * *

the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, * * * and to allot the lands in said reservation in severalty to any Indian located thereon in (specified) quantities." [115]

9: Section 5 of the Act, 25 U.S.C.A. S 348, provided:

"That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

10: Section 7 of the Act, 25 U.S.C.A., S 381, provided: "That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may

deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor."

11: On April 23, 1904, an Act entitled "An act for the survey and allotment of lands now embraced within the Flathead Indian Reservation in the State of Montana and the sale and disposal of all surplus lands after allotment" was duly approved by the President of the United States; (33 Stat. 302-306);

12: This Act provides in part as follows:

"That the Secretary of the Interior be, and he is hereby, directed to immediately cause to be surveyed all of the Flathead Indian Reservation, situated within the State of Montana, the same being particularly described and set forth in [116] article two of a certain treaty entered into by and between Isaac H. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenai, and Upper Pend d'Oreille Indians, on the sixteenth day of July, Eighteen hundred and fifty-five.

"Sec. 2. That so soon as all of the lands embraced within said Flathead Indian Reservation shall have been surveyed, the Commissioner of Indian Affairs shall cause allotments of the same to be made to all persons having tribal rights with said con-

federated tribes of Flatheads, Kootenais, Upper Pend d'Oreille, and such other Indians and persons holding tribal relations as may rightfully belong on said Flathead Indian Reservation, including the Lower Pend d'Oreille or Kalispel Indians now on the reservation, under the provisions of the allotment laws of the United States.

“Sec. 3. That upon the final completion of said allotments to said Indians, the President of the United States shall appoint a commission consisting of five persons to inspect, appraise, and value all of the said lands that shall not have been allotted in severalty to said Indians, * * *.

“Sec. 4. That within thirty days after their appointment said commission shall meet at some point within the boundaries of said Flathead Indian Reservation and organize by the election of one of their number as chairman. * * *.

“Sec. 5. That said commissioners shall then proceed to personally inspect and classify and appraise, by the [117] smallest legal subdivisions of forty acres each, all of the remaining lands embraced within said reservation. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, timber lands, the same to be lands more valuable for their timber than for any other purpose; fourth, mineral lands; and fifth, grazing lands.

“Sec. 8. That when said commission shall have completed the classification and appraisement of all

of said lands and the same shall have been approved by the Secretary of the Interior, the land shall be disposed of under the general provisions of the homestead, mineral, and town-site laws of the United States, except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby granted to the State of Montana for school purposes. * * *. Provided, That the United States shall pay to said Indians for the lands in said sections sixteen and thirty-six or the lands selected in lieu thereof, the sum on one dollar and twenty-five cents per acre.

“Sec. 9. That said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation: * * *: [118] Provided further, That the price of said lands shall be the appraised value thereof, as fixed by the said commission, * * *.

* * * * *

“Sec. 14. That the proceeds received from the sale of said lands in conformity with this Act shall be paid into the Treasury of the United States, and after deducting the expenses of the commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily

incurred, and expenses of the survey of the lands, shall be expended or paid as follows: One-half shall be expended from time to time by the Secretary of the Interior as he may deem advisable for the benefit of the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the time that this Act shall take effect, in the construction of irrigation ditches, the purchase of stock cattle, farming implements, or other necessary articles to aid the Indians in farming and stock raising, and in the education and civilization of said Indians, and the remaining half to be paid to the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the date of the proclamation provided for in Section Nine hereof, or expended on their account, as they may elect."

13: Section 19 of the Act of June 21, 1906, 34 Stat. pages 325 to 355, making appropriations for the Indian Department, amended the Act of April 23, 1904, by making additions thereto.

14: With specific reference to the Flathead Indian Reservation in Montana this Act provides:

That the Act of April 23, 1904, (33rd Statutes at Large, page 302), entitled "An Act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation in the State of Montana, and the sale and disposal [119] of all surplus lands after allotment" as amended by Section 9 of the Act of March 3, 1935, (33rd Statues

at Large, page 1048), be amended by adding the following sections:

* * * * *

“Sec. 19. That nothing in this act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land is granted by the act, of the use of water appropriated and used by them for the necessary irrigation of their lands or for domestic use, or any ditches, dams, flumes, reservoirs constructed and used by them in the appropriation and use of said water.

34 Stat., pages 354-355.

15: The Act of May 29, 1908, (35 Stat. 444, 448), amended sections 9 and 14 of the Act of April 23, 1904.

16: Section 9 as amended provided in part: “The land irrigable under the systems herein provided, which has been allotted to the Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such lands without costs to the Indians for construction of such irrigation systems;

17: The Act of May 29, 1908, Chapter 216, Page 444, 35 Statutes at Large, entitled “An Act to authorize the Secretary of the Interior to issue patents in fee to purchasers of Indian lands under any law now existing or hereafter enacted, and for other purposes” provided in part as follows:

“Sec. 15. That section 9, chapter 1495, Statutes of the United States of America, entitled “An Act

for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment," be and the same is hereby amended to read as follows: Sec. 9. That said lands shall be open to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when the manner in which these lands may [120] be settled upon, occupied and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy or enter any of said lands except as prescribed in such proclamation: * * *." (35 Stat. pages 448-449.)

"That lands irrigable under the systems herein provided, which has been allotted to Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for the construction of such irrigation systems. The purchaser of any Indian allotment, purchased prior to the expiration of the trust period thereon, shall be exempt from any and all charges for construction of the irrigation system incurred up to the time of such purchase. All lands allotted to Indians shall bear the pro-rata share of the cost of the operation and maintenance of the system under which they lie.

* * * * *

"The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary for the

purpose of carrying the provisions of this Act into full force and effect." (35 Stat. page 450.)

18: Section 14, as amended, provided that "the proceeds received from the sale of said lands in conformity with this Act shall be paid into the Treasury of the United States, and, after deducting the expense of the Commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred for expenses of the survey of the land, shall be expended or paid as follows: So much thereof as the Secretary of the Interior may deem advisable in the construction of irrigation systems for the irrigation of irrigable lands embraced within the limits of said reservation; one-half of the money remaining after the construction of said irrigation systems to be expended by the Secretary of the Interior [121] as he may deem advisable for the benefit of said Indians in the purchase of livestock, farming implements, or the necessary articles to aid said Indians in farming and stock-raising and in the education and civilization of said Indians, and the remaining one-half of said money to be paid to said Indians and persons holding tribal relations on said reservation, * * *." (35 Stat. page 450.)

19: At the time of the ratification of said treaty of July 16, 1855, and ever since said time continuing to the present, the Jocko River, Dry Creek, Mission Creek, Post Creek, March Creek, Crow Creek and its branches, Mud Creek and its branches,

Lost Creek, Big Creek, and Hell Roaring Creek, were, have been, and are existing innavigable streams of water rising in the Mission Mountains in Montana and flowing through well defined channels with natural banks in the Mission Division of the Flathead Irrigation Project system on the Flathead Indian Reservation in Montana.

20: 'The Act of June 17, 1902, 32 Stat. 388, provides that all monies received from the sale and disposal of public lands in certain States, including Montana, beginning with the fiscal year ending June 30, 1901, shall be, and the same are hereby, reserved, set aside and appropriated as a special fund in the Treasury to be known as the "Reclamation Fund", to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion and development of waters for the reclamation of arid lands in said states and for the payment of all other expenditures provided in the Act, and directs that the Secretary of the Interior make examinations and surveys for and to locate and construct, as therein provided, irrigation works for the storage, diversion and development of waters (Sec. 2). That the Secretary of the Interior shall before giving the public notice provided for in Section 4 of this Act withdraw from public entries the lands required for [122] any irrigation works contemplated under the provisions of the Act and shall restore to public entry any lands so withdrawn when in his judgment

said lands are not required for the purposes of the Act (Sec. 3). That upon the determination by him that any irrigation project is practicable he may cause to be let contracts for the construction of the same in such portions or sections as it may be practicable to construct and complete as parts of the whole project, provided the necessary funds for such portions or sections are available in the Reclamation Fund, and thereupon he shall give public notice of the lands irrigable under such project and limit of acre per entry, which limit shall represent the acreage which in the opinion of the Secretary may be reasonably required for the support of the family on the lands in question; also of the charges which shall be made per acre upon the said entries and upon lands in private ownership which may be irrigated by the waters of said irrigation project (Sec. 4). That the entryman upon lands to be irrigated by such works shall in addition to compliance with the homestead law reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the government the charges appropriated against such tract, as provided in Section 4 (Sec. 5). To use the Reclamation Fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this Act (Sec. 6), and also that where in carrying out the provisions of the Act it becomes necessary to acquire any

rights or property the Secretary of the Interior is authorized to acquire the same for the United States by purchase or by condemnation thereof under judicial process, and to pay from the Reclamation Fund the sums which may be needed for that purpose (Sec. 7). [123]

21: This Act also provides that nothing therein shall be construed as affecting or intended to affect or in any way interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of waters used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior in carrying out the provisions of this Act shall proceed in conformity with such laws, and also provides that the right to the use of waters acquired under the provisions of the Act shall be appurtenant to the lands irrigated, and beneficial use shall be the basis, the measure and the limit of the right (Sec. 8). And in conclusion the Secretary of the Interior is authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of the Act into full force and effect (Sec. 10).

22: Section 1 of Chapter 44, Laws of Montana 1905, re-enacted as Section 4846 Revised Codes of Montana 1907 and Section 7099 Revised Codes of Montana 1921 and 1935, provides that the government of the United States may, by and through the Secretary of the Interior, or any person by him

duly authorized to act in that behalf, appropriate the waters of the streams or lakes within the State of Montana in the same manner and subject to the general conditions applicable to the appropriation of the waters of the state by private individuals.

23: One H. N. Savage, Supervising Engineer, United States Reclamation Service, claiming to be thereunto duly authorized by the Secretary of the Interior of the United States in that behalf, under and pursuant to acts referred to in the last two findings, did pretend to make the following appropriations of the waters of Post Creek and its tributaries: [124]

Date of Appropriation	Amount of Appropriation	Date of Recordation in Office of County Clerk & Recorder, Missoula County, Montana	Vol. & Page Recorded in Book of Water Rights
Mar. 13, 1913	5,000 cubic feet of water per sec- ond of time	April 7, 1913	Vol. J., P. 21
Mar. 31, 1913	500 cubic feet of water per sec- ond of time	April 7, 1913	Vol. J., p. 13
Apr. 5, 1912	500 cubic feet	April 7, 1913	Vol. J., p. 25
Mar. 29, 1913	of water per sec- ond of time		

(See Plaintiff's Exhibit 6);

24: The United States applied these waters to beneficial use within the time specified by the laws of the State of Montana, (Sec. 7099 R.C.M. 1935), and for the purposes as set out in the aforesaid

notices of appropriation pretended to be made by said H. N. Savage, and the United States has continuously used, and is now using, except as prevented by the defendants herein, all of the waters of Post Creek in its Flathead Irrigation Project system;

25: The lands on the Flathead Indian Reservation in Montana, and particularly the lands described in plaintiff's complaint herein and defendants' answer thereto, and in the complaint in intervention herein, and hereinafter specifically stated to have been allotted and patented to Indians of the Flathead Reservation in Montana, are, and at all times have been, arid in character and require, and at all times have required, irrigation in order that they produce crops to the full extent of the soil thereof;

26: On or about October 8, 1908, the United States issued to one Duncan McDonald, a Flathead Indian, Allottee No. 561, its trust patent for the East Half of the Northeast Quarter ($E\frac{1}{2}$ of $NE\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West of the Montana Meridian, Montana, containing 80 acres of agricultural land, and on December 4, 1919, the United States executed and delivered to said Duncan McDonald a fee simple [125] patent for said land so allotted as aforesaid, (Defendants' Exhibit 23);

27: On or about October 8, 1908, the United States issued to one Florence McDonald, a Flathead

Indian, Allottee No. 560, its trust patent for the Southwest Quarter of the Northeast Quarter ($SW\frac{1}{4}$ of $NE\frac{1}{4}$) and the Northwest Quarter of the South Quarter ($NW\frac{1}{4}$ of $S\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West of the Montana Meridian, Montana, containing 80 acres of agricultural land, and on November 5, 1917, the United States executed and delivered to said Florence McDonald a fee simple patent for said land so allotted as aforesaid, (Defendants' Exhibit 24);

28: On or about October 8, 1908, the United States issued to one Mary C. McDonald, a Flathead Indian, Allottee No. 559, its trust patent for the Southeast Quarter of the Northwest Quarter ($SE\frac{1}{4}$ of $NW\frac{1}{4}$) and the Northeast Quarter of the Southwest Quarter ($NE\frac{1}{4}$ of $SW\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West of the Montana Meridian, Montana, containing 80 acres of agricultural land, and on November 17, 1915, the United States executed and delivered to said Mary C. McDonald a fee simple patent for said land so allotted as aforesaid, (Defendants' Exhibit 25);

29: On or about October 8, 1908, the United States issued to one Frank Fiddler, a Flathead Indian, Allottee No. 785, its trust patent for the West Half of the Southwest Quarter ($W\frac{1}{2}$ of $SW\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West of the Montana Meridian, Montana, containing 80 acres of agricultural land, and on September 2, 1925, the United States executed and

delivered to said Frank Fiddler a fee simple patent for said land so allotted as aforesaid, (Defendants' Exhibit 26);

30: That in each of said fee simple patents so issued as aforesaid it is stated: "Now Know Ye That the United States of America in consideration of the premises has given and granted, and by these presents does give and [126] grant, unto the said claimant, and to the heirs of said claimant, the lands above described; to have and to hold the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the said claimant and to the heirs and assigns of said claimant forever."

31. On or about October 8, 1908, the United States issued to one William Deschamp, a Flathead Indian, Allottee No. 781, its trust deed for the Southwest Quarter of the Northwest Quarter of Section 16 (SW $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 16) and the Southeast Quarter of the Northeast Quarter of Section 17 (SE $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 17) in Township 19 North of Range 19 West of the Montana Meridian, Montana, containing 80 acres of agricultural land. Thereafter said William Deschamp died, and on August 16, 1920, the United States executed and delivered to Joseph Deschamp and Mary Rodgers Deschamp, heirs of said William Deschamp, a Flathead Indian, a fee simple patent for said lands, which, among other things, provides: "Now Know Ye that the United States of America in consideration of the

premises has given and granted, and by these presents does give and grant, unto the said heirs, and to their heirs, the lands above described; to have and to hold the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the said heirs and to their heirs and assigns forever." (Defendants' Exhibit 27);

32: On or about October 8, 1908, the United States issued to one Edward Deschamps, a Flathead Indian, Allottee No. 783, its trust patent for the East Half of the Southeast Quarter ($E\frac{1}{2}$ of $SE\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West of the Montana Meridian, Montana, containing 80 acres of agricultural land, and on November 9, 1910, the United States executed and delivered to said Edward Deschamps a fee simple patent for said land so allotted as aforesaid, (Defendants' Exhibit 28); [127]

33: On or about October 8, 1908, the United States issued to one Oro D. Freeman, a Flathead Indian, Allottee No. 784, its trust patent for the West Half of the Southeast Quarter ($W\frac{1}{2}$ of $SE\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West of the Montana Meridian, Montana, containing 80 acres of agricultural land, and on March 8, 1917, the United States executed and delivered to said Oro D. Freeman a fee simple patent for said land so allotted as aforesaid, (Defendants' Exhibit 29);

34: On or about October 8, 1908, the United States issued to one John Minesinger, a Flathead Indian, Allottee No. 690, its trust patent for the South Half of the Northwest Quarter ($S\frac{1}{2}$ of $NW\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West of the Montana Meridian, Montana, containing 80 acres of agricultural land, and on December 4, 1919, the United States executed and delivered to said John Minesinger, a fee simple patent for said land so allotted as aforesaid, (Defendants' Exhibit 30);

35: On or about October 8, 1908, the United States issued to one James Waymack, a Flathead Indian, Allottee No. 689, its trust patent for the West Half of the Southwest Quarter ($W\frac{1}{2}$ of $SW\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West of the Montana Meridian, Montana, containing 80 acres of agricultural land, and on October 10, 1910, the United States executed and delivered to James Waymack a fee simple patent for said land so allotted as aforesaid, (Defendants' Exhibit 31);

36: On or about October 8, 1908, the United States issued to one Emma M. Magee, a Flathead Indian, Allottee No. 688, its trust patent for the East Half of the Southeast Quarter ($E\frac{1}{2}$ of $SE\frac{1}{4}$) of Section 18 in Township 19 North of Range 19 West of the Montana Meridian, Montana, containing 80 acres of agricultural land, and on August 25, 1916, the United States executed and delivered

to Emma M. Magee a fee simple patent for said land so allotted as aforesaid, (Defend- [128] ants' Exhibit 32) ;

37: Each of the patents referred to in Findings 32, 33, 34, 35 and 36 above contained the following words: "Now Know Ye that the United States in consideration of the premises has given and granted, and by these presents does give and grant unto the said claimant, and to the heirs of the said claimant, the land above described; to have and to hold the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever ;

38: On August 22, 1934, the defendant Beckwith Mercantile Company subscribed, acknowledged and delivered to Clarence L. McVey and Lillian L. McVey, husband and wife, as joint tenants, the survivor to take the whole, its certain deed, in writing, wherein it granted, bargained, sold and conveyed unto them, and to their heirs and assigns forever, the real property situated in the County of Lake and State of Montana particularly described as the Southwest Quarter of the Northeast Quarter ($SW\frac{1}{4}$ of $NE\frac{1}{4}$) and the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}$ of $SE\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West of the Montana Meridian, Montana, together with all water-rights, water, ditches and flumes connected

with or appurtenant thereto. The land covered by this deed is that conveyed to Florence McDonald by fee simple patent, as aforesaid, (Defendants' Exhibit 34); and at all times thereafter the grantees mentioned in said deed have been, and they are now, the owners in fee simple absolute of the land described therein;

39: At the time the complaint was filed herein—April 23, 1936—the defendant B. W. Alexander was the owner of and in possession and control of the lands lying within the Flathead Indian Reservation in Montana particularly described as the East Half of the Northeast Quarter ($E\frac{1}{2}$ of $NE\frac{1}{4}$) of Section 16, Township 19 North of Range 19 West, Montana Meridian, Montana, formerly known as the Duncan McDonald Allotment No. 561; [129]

40: At the time the complaint was filed herein as aforesaid the defendant Beckwith Mercantile Company, a Montana Corporation, was not the owner of or in the control or possession of the lands lying within the Flathead Indian Reservation in Montana particularly described as the Southwest Quarter of the Northeast Quarter ($SW\frac{1}{4}$ of $NE\frac{1}{4}$) and the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}$ of $SE\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West, Montana Meridian, Montana, formerly known as the Florence McDonald Allotment No. 560, or any part or portion of the same; and at said time, and at all times since then, the defendant John A. Hazel was in control and

possession of said lands as tenant of Clarence L. McVey and Lillian L. McVey;

41: At the time the complaint was filed herein, as aforesaid, the defendants Theodore Knutson and Edna I. Knutson, his wife, were the owners of and in the control and possession of those certain lands lying within the Flathead Indian Reservation in Montana particularly described as the Southeast Quarter of the Northwest Quarter ($SE\frac{1}{4}$ of $NW\frac{1}{4}$) and the Northeast Quarter of the Southwest Quarter ($NE\frac{1}{4}$ of $SW\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West, Montana Meridian, Montana, formerly known as the Mary C. McDonald Allotment No. 559;

42: At the time the complaint was filed herein, as aforesaid, the defendant P. W. Sorenson was the owner of and in the control and possession of the lands lying within the Flathead Indian Reservation in Montana particularly described as the West Half of the Southwest Quarter ($W\frac{1}{2}$ of $SW\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West of the Montana Meridian, Montana, formerly known as the Frank Fiddler Allotment No. 785;

43: At the time the complaint was filed herein, as aforesaid, the defendant Avery A. Stevens was the owner of and in the control and possession of the lands lying within the Flathead [130] Indian Reservation in Montana particularly described as the Southwest Quarter of the Northwest Quarter

(SW $\frac{1}{4}$ of NW $\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West, Montana Meridian, Montana, and the Southeast Quarter of the Northeast Quarter (SE $\frac{1}{4}$ of NE $\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West, Montana Meridian, Montana, formerly known as the William Deschamps Allotment No. 781;

44: At the time the complaint was filed herein the defendants Avery A. Stevens and Meil C. Pierce were the owners of and in the possession and control of the lands lying within the Flathead Indian Reservation in Montana particularly described as the East Half of the Southeast Quarter (E $\frac{1}{2}$ of SE $\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West, Montana Meridian, Montana, formerly known as the Edward Deschamps Allotment No. 783;

45: At the time the complaint was filed herein the defendants Bert Lish, Bert Myers Nelson and John Ellis were the owners of and in the control and possession of the lands lying within the Flathead Indian Reservation in Montana particularly described as the West Half of the Southeast Quarter (W $\frac{1}{2}$ of SE $\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West, Montana Meridian, Montana, formerly known as the Ora Deschamps Allotment No. 784;

46: At the time the complaint was filed herein, as aforesaid, the defendants John Minesinger and Ada B. Minesinger, his wife, were the owners of

and in the possession and control of the lands lying within the Flathead Indian Reservation in Montana particularly described as the South Half of the Northwest Quarter ($S\frac{1}{2}$ of $NW\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West, Montana Meridian, Montana, formerly known as the John Minesinger Allotment No. 690; and it is stated in the complaint on file herein; "That pursuant to the afore- [131] said Acts of Congress of June 21, 1906, and May 29, 1908, on November 25, 1921, the Secretary of the Interior granted a valid and subsisting water-right from Post Creek to 75.4 acres of the above described tract, * * *, to the extent of 2 acre feet of water per acre per annum, or a total of 150.8 acre feet per annum";

47: At the time the complaint was filed herein the defendant Thomas Wald was the owner of and in the possession and control of the lands lying within the Flathead Indian Reservation in Montana particularly described as the West Half of the Southwest Quarter ($W\frac{1}{2}$ of $SW\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West, Montana Meridian, Montana, formerly known as the James Waymack Allotment No. 689, and the East Half of the Southeast Quarter ($E\frac{1}{2}$ of $SE\frac{1}{4}$) of Section 18 in Township 19 North of Range 19 West, Montana Meridian, Montana, formerly known as the Emma M. Magee Allotment No. 688; and it is stated in the complaint on file herein in connection with the James Waymack Allotment No. 689: "That pursuant to the aforesaid Acts of Congress of June

21, 1906, and May 29, 1908, on November 25, 1921, the Secretary of the Interior granted a valid and subsisting water-right from Post Creek to 52.3 acres of the above described tract, * * *, to the extent of 2 acre feet of water per acre per annum, or a total of 104.6 acre feet per annum"; and, in connection with the Emma M. Magee Allotment No. 688 it is stated in the complaint herein: "That pursuant to the aforesaid Acts of Congress of June 21, 1906, and May 29, 1908, on November 25, 1921, the Secretary of the Interior granted a valid and subsisting water-right from Post Creek to 80 acres of the above described tract, * * *, to the extent of 2 acre feet of water per acre per annum, or a total of 160 acre feet per annum";

48: At the trial the plaintiff, the defendants, and the interveners, stipulated "that the defendants are the present owners of the lands involved in this action in equity" and that [132] the deeds by which they received the property contain the words "Together with any and all hereditaments and appurtenances". (Tr. p. 297)

49: On November 10, 1936, an order pro confesso was entered herein against the defendants Bert Myers Nelson, John Ellis, J. A. McKeever and Axel Erickson for failure to answer or further plead within the time allowed by the court on May 20, 1936;

50: At the time the complaint was filed herein, as it appears therefrom, (paragraph 17), the de-

fendant Axel Erickson was in control and possession of the lands lying within the Flathead Indian Reservation in Montana particularly described as the North Half of the Northwest Quarter ($N\frac{1}{2}$ of $NW\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West, Montana Meridian, Montana, and "that pursuant to the aforesaid Acts of Congress of June 21, 1906, and May 29, 1908, on November 25, 1921, the Secretary of the Interior granted a valid and subsisting water-right from Post Creek to 77.4 acres of the above described tract, known as the Julia Minesinger Allotment No. 691, to the extent of two (2) acre feet of water per acre per annum or a total of 154.8 acre feet per annum";

51: Purporting to act pursuant to the Acts of Congress of June 21, 1906, (34 Stat. 354), and May 29, 1908, (35 Stat. 448-450), the Secretary of the Interior appointed a committee to make findings of the water-rights on the Flathead Reservation in Montana. This committee made personal investigations on the ground and heard testimony and reviewed surveys made by engineers of the United States Reclamation Service of each tract of land on the Flathead Indian Reservation in Montana where irrigation had been used and early water-right developments made prior to the year 1909.

52: On December 10, 1919, this committee made its report to the Secretary of the Interior regarding early developments of water-rights on Post Creek and other streams [133] within the boundaries

of the Flathead Indian Reservation in Montana and made certain recommendations in accordance with instructions of the Secretary of the Interior. (Plaintiff's Exhibit 8)

53: The controlling principle observed in making the findings of the committee, as stated by it, was as follows:

In order that equity shall be done to all the various interests involved it is recommended that water-rights be determined under the following regulations:

Beneficial use prior to the appropriation by the United States shall be the basis, the measure and the limit of the right to the use of these waters at all times irrespective of the carrying capacity of the ditch, and not exceeding for irrigation a limit of two acre feet per annum at the point of diversion; that the right to the use of water for irrigation shall be inseparably appurtenant to the land and no right to the use of water for irrigation can be acquired independent of its use upon and attached to different tracts of land and that water-right cannot be detached from the land, place or purpose for which they were acquired without the loss of priority.

54: This committee determined that Joseph McDonald and Joseph Deschamps, in 1906, constructed a ditch diverting water from Post Creek on the Flathead Indian Reservation in Montana, at a point on the left bank in the Southeast Quarter of the

Northwest Quarter of the Northeast Quarter ($SE\frac{1}{4}$ of $NW\frac{1}{4}$ of $NE\frac{1}{4}$) of Section 10, Township 19 North of Range 19 West, Montana Meridian, Montana, for the purpose of conveying water upon lands on the Flathead Indian Reservation in Montana, allotted and later patented to Indians of the Flathead Nation as follows:

Edward Deschamps, Allotment No. 783, North Half of the Southeast Quarter ($N\frac{1}{2}$ of $SE\frac{1}{4}$) of Section 17, Township 19 North of Range 19 West, Montana Meridian, Montana, and that ever [134] since that date there have been irrigated 9.5 acres in the Southeast Quarter of the Southeast Quarter ($SE\frac{1}{4}$ of $SE\frac{1}{4}$) and 0.8 acres in the Northeast Quarter of the Southeast Quarter ($NE\frac{1}{4}$ of $SE\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West; and said 10.3 acres were declared to have a valid and subsisting water-right from Post Creek to the extent of 2 acre feet per acre per annum, or a total of 20.6 acre feet per annum; that none of the remaining area of said allotment has a water-right from any source;

Oro Deschamps, Allotment No. 784; and that ever since said date there has been irrigated 4.8 acres in the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}$ of $SE\frac{1}{4}$) and 9.3 acres in the Southwest Quarter of the Southeast Quarter ($SW\frac{1}{4}$ of $SE\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West, Montana Meridian, Montana, and that said 14.1 acres have a valid and subsisting water-right from Post Creek to the extent of 2 acre feet per acre

per annum, or a total of 28.2 acre feet per annum; that none of the remaining area of said allotment has a water-right from any source;

William Deschamps, Allotment No. 781; and that ever since said date there have been irrigated 9.6 acres in the Southwest Quarter of the Northwest Quarter ($SW\frac{1}{4}$ of $NW\frac{1}{4}$) of Section 16 and 1.5 acres in the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}$ of $NE\frac{1}{4}$) of Section 17, Township 19 North of Range 19 West, Montana Meridian, Montana, and that said 11.1 acres have a valid and subsisting water-right from Post Creek to the extent of 2 acre feet per acre per annum, or a total of 22.2 acre feet per annum; and that none of the remaining area of said allotment has a water-right from any source;

Frank Fiddler, Allotment No. 785; and that ever since said date there has been irrigated 0.9 acres in the Northwest Quarter of the Southwest Quarter ($NW\frac{1}{4}$ of $SW\frac{1}{4}$) and 17.4 acres in the Southwest Quarter of the Southwest Quarter ($SW\frac{1}{4}$ of $SW\frac{1}{4}$) of Section 16 [135] in Township 19 North of Range 19 West, Montana Meridian, Montana, and that said 18.3 acres have a valid and subsisting water-right from Post Creek to the extent of 2 acre feet per acre per annum, or a total of 36.6 acre feet per annum; that none of the remaining area of said allotment has a water-right from any source;

Duncan McDonald, Allotment No. 566; and that ever since said date there has been irrigated 7.3

acres in the Northeast Quarter of the Northeast Quarter ($NE\frac{1}{4}$ of $NE\frac{1}{4}$) and 9.5 acres in the Southeast Quarter of the Northwest Quarter ($SE\frac{1}{4}$ of $NW\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West, Montana Meridian, Montana; that said 16.8 acres have a valid and subsisting water-right from Post Creek to the extent of 2 acre feet per acre per annum, or a total of 33.6 acre feet per annum; that none of the remaining area of said allotment has a water-right from any source;

Florence McDonald, Allotment No. 560; and that ever since said date there have been irrigated 6.3 acres in the Southwest Quarter of the Northeast Quarter ($SW\frac{1}{4}$ of $NE\frac{1}{4}$) and 1.9 acres in the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}$ of $SE\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West, Montana Meridian, Montana; that said 8.2 acres have a valid and subsisting water-right from Post Creek to the extent of 2 acre feet per acre per annum, or a total of 16.4 acre feet per annum; and that none of the remaining area of said allotment has a water-right from any source;

55: Referring to the Mary C. McDonald Allotment No. 559 this committee determined that in 1906 Joseph McDonald and William, Edward and Joseph Deschamps constructed a ditch diverting water from Post Creek at the point referred to in the last finding for the purpose of conveying water upon portions of this allotment; that ever since that date there have been irrigated 0.8 acres in the South-

east Quarter of the Northwest Quarter ($SE\frac{1}{4}$ of $NW\frac{1}{4}$) and 2.4 acres in the Northeast Quarter of the South- [136] west Quarter ($NE\frac{1}{4}$ of $SW\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West, Montana Meridian, Montana; that said 3.2 acres have a valid and subsisting water-right from Post Creek to the extent of 2 acre feet per acre per annum, or a total of 6.4 acre feet per annum; and that none of the remaining area of said allotment has a water-right from any source;

56: Referring to the Caroline McKeever allotment No. 791 this committee determined that Caroline McKeever in 1908 extended the McDonald-Deschamps ditch diverting water from Post Creek at the point referred to in the last finding for the purpose of conveying water upon portions of this allotment; that at various times since said date there have been irrigated 1.3 acres in the Northwest Quarter of the Northwest Quarter ($NW\frac{1}{4}$ of $NW\frac{1}{4}$) and 0.1 acres in the Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4}$ of $NW\frac{1}{4}$) of Section 21 in Township 19 North of Range 19 West, Montana Meridian, Montana; that said 1.4 acres hereinbefore described have a valid and subsisting water-right from Post Creek to the extent of 2 acre feet per acre per annum, or a total of 2.8 acre feet per annum; and that none of the remaining area of said allotment has a water-right from any source;

57: Referring to the Emma M. Magee allotment No. 688 this committee determined that A. D. Ma-

gee, the husband of the allottee, in 1908 extended the ditch constructed by George Buckhouse for the Minesinger lands for diverting water from Post Creek at a point on the left bank in the Southeast Quarter of the Northwest Quarter of the Northeast Quarter ($SE\frac{1}{4}$ of $NW\frac{1}{4}$ of $NE\frac{1}{4}$) of Section 10 in Township 19 North of Range 19 West, Montana Meridian, Montana, for the purpose of conveying water upon portions of this allotment; that since 1908 there have been irrigated 40 acres in the Northeast Quarter of the Southeast Quarter ($NE\frac{1}{4}$ of $SE\frac{1}{4}$) and 40 acres in the Southeast Quarter of the Southeast Quarter ($SE\frac{1}{4}$ of $SE\frac{1}{4}$) of Section 18 in Township 19 North of Range 19 West; that said 80 acres have a valid and subsisting [137] water-right from Post Creek to the extent of 2 acre feet per acre per annum, or a total of 160 acre feet per annum; and that none of the remaining area has a water-right from any source;

58: Referring to the John Minesinger allotment No. 690 this committee determined that George Buckhouse, at that time renter of this allotment, in 1907 and 1908 constructed a ditch diverting water from Post Creek at a point on the left bank in the Southeast Quarter of the Northwest Quarter ($SE\frac{1}{4}$ of $NW\frac{1}{4}$ of the Northeast Quarter ($NE\frac{1}{4}$) of Section 10 in Township 19 North of Range 19 West, Montana Meridian, Montana, for the purpose of conveying water upon portions of this allotment; that since 1908 there have been irrigated 38.7 acres in

the Southwest Quarter of the Northwest Quarter (SW $\frac{1}{4}$ of NW $\frac{1}{4}$) and 36.7 acres in the Southeast Quarter of the Northwest Quarter (SE $\frac{1}{4}$ of NW $\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West, Montana Meridian, Montana; that said 75.4 acres have a valid and subsisting water-right from Post Creek to the extent of 2 acre feet per acre per annum, or a total of 150.8 acre feet per annum; and that none of the remaining area of said allotment has a water-right from any source;

59: Referring to the Julia Minesinger Allotment No. 691 this committee determined that George Buckhouse, at that time renter of this allotment, in 1907 and 1908 constructed a ditch diverting water from Post Creek at the point referred to in the last finding for the purpose of conveying water upon portions of this allotment; that since 1908 there have been irrigated 39.1 acres in the Northwest Quarter of the Northwest Quarter (NW $\frac{1}{4}$ of NW $\frac{1}{4}$) and 38.3 acres in the Northeast Quarter of the Northwest Quarter (NE $\frac{1}{4}$ of NW $\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West, Montana Meridian, Montana; that said 77.4 acres have a valid and subsisting water-right from Post Creek to the extent of 2 acre feet per acre per annum, or a total of 154.8 acre feet per annum; and that none of the remaining area of this allotment has a water-right from any source; [138]

60: Referring to the James Waymack allotment No. 689 this committee determined that A. G. Ma-

gee, the step-father of this allottee, in 1908 extended the ditch constructed by George Buckhouse for the Minesinger lands and diverting water from Post Creek at the point referred to in the last finding for the purpose of conveying water upon portions of this allotment; that since 1908 there have been irrigated 39.3 acres in the Northwest Quarter of the Southwest Quarter (NW $\frac{1}{4}$ of SW $\frac{1}{4}$) and 13 acres in the Southwest Quarter of the Southwest Quarter (SW $\frac{1}{4}$ of SW $\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West, Montana Meridian, Montana; that said 52.3 acres have a valid and subsisting water-right from Post Creek to the extent of 2 acre feet per acre per annum, or a total of 104.6 acre feet per annum; and that none of the remaining area of said allotment has a water-right from any source;

61: In concluding its report the committee said:

“Filings are continually being made in Sanders, Missoula and Flathead counties claiming use to the rights of the water of the streams of the Flathead Reservation. These waters are determined by the committee to be a tribal asset of the Indians allotted on the Flathead Reservation and to be appurtenant to the allotted lands and the unallotted irrigable lands as approved by the Secretary of the Interior, and settlers on ceded lands are subordinate in right to the needs and uses of the Indian allotments and farm units.”

62: The report of said committee and its recom-

mendations were approved by the Secretary of the Interior on November 25, 1921;

63: It appears from Plaintiff's Exhibit 10, and the Court finds, that:

73 acres of irrigable land on the Florence McDonald Allotment No. 560 can be irrigated with water carried from Post Creek through the McDonald-Deschamps ditch; [139]

78.5 acres of irrigable land on the Edward Deschamps Allotment No. 783 can be irrigated with water carried from Post Creek through the McDonald-Deschamps ditch;

74.5 acres of irrigable land on the Oro Deschamps Allotment No. 784 can be irrigated with water carried from Post Creek through the McDonald-Deschamps ditch;

68 acres of irrigable land on the William Deschamps Allotment No. 781 can be irrigated with water carried from Post Creek through the McDonald-Deschamps ditch;

48 acres of irrigable land on the Frank Fiddler Allotment No. 785 can be irrigated with water carried from Post Creek through the McDonald-Deschamps ditch;

35 acres of irrigable land on the Duncan McDonald Allotment No. 561 can be irrigated with water carried from Post Creek through the McDonald-Deschamps ditch;

70 acres of irrigable lands on the Mary C. McDonald Allotment No. 559 can be irrigated with

water carried from Post Creek through the McDonald-Deschamps ditch;

78 acres of irrigable land on the Caroline McKeever Allotment No. 791 can be irrigated with water carried from Post Creek through the McDonald-Deschamps ditch;

80 acres of irrigable land on the Emma M. Magee Allotment No. 688 can be irrigated with water carried from Post Creek through the Magee-Minesinger ditch;

78 acres of irrigable land on the John Minesinger Allotment No. 690 can be irrigated with water carried from Post Creek through the Magee-Minesinger ditch;

80 acres of irrigable land on the Julia Minesinger Allotment No. 691 can be irrigated with water carried from Post Creek through the Magee-Minesinger ditch; and,

79.6 acres of irrigable land on the James Waymack Allotment No. 689 can be irrigated with water carried from Post Creek through the Magee-Minesinger ditch; [140]

64: Two and one-half acre feet of water per acre per annum delivered on the land in the growing season is required to produce crops to the full extent of the soil on each of said irrigable acres on the Florence McDonald Allotment No. 560; on the Edward Allotment No. 783; on the Oro Deschamps Allotment No. 784; on the William Deschamps Allotment No. 781; on the Frank Fiddler Allotment No. 785; on the Duncan McDonald Allotment No.

561; on the Mary C. McDonald Allotment No. 559; and, on the Caroline McKeever Allotment No. 791;

65: Two acre feet of water per acre per annum delivered on the land in the growing season is required to produce crops to the full extent of the soil on each of said irrigable acres on the Emma M. Magee Allotment No. 688; on the John Minesinger Allotment No. 690; on the Julia Minesinger Allotment No. 691; and, on the James Waymack Allotment No. 689;

66. It is shown that during the months of June, July, August and September of the irrigation season in the year 1935 the defendants B. W. Alexander, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorensen, Avery Stevens, Meil C. Pierce, Bert Lish, Bert Myers Nelson and J. A. McKeever diverted from Post Creek, through the private ditch known as the McDonald-Deschamps ditch, and hereinbefore referred to, 1051.91 acre feet of water, and in the year 1936 1031.74 acre feet of water, in the year 1937 1253.94 acre feet of water, and, in the year 1938 1490.32 acre feet of water, for use, and actually used, in the necessary irrigation of their lands hereinbefore specifically described; but,

It is not shown that in doing so they, or either or any of them, acted wrongfully or unlawfully;

67: It is shown that during the months of June, July, August and September of the irrigation season in the year 1935 the defendants Axel Erickson,

John Minesinger and Ada B. Minesinger, his wife, and Thomas Wald diverted from Post Creek, through the private ditch known as the Magee-Minesinger ditch, and hereinbefore referred to, 2180.9 acre feet of water, and in [141] the year 1936 2481.15 acre feet of water, in the year 1937 2156.02 acre feet of water, and, in the year 1938 2558.16 acre feet of water, for use, and actually used, in the necessary irrigation of their lands hereinbefore specifically described; but,

It is not shown that in doing so they, or either or any of them, acted wrongfully or unlawfully;

68: On July 12, 1935, Henry Gerharz as Project Engineer on the Flathead Irrigation Project on the Flathead Indian Reservation in the State of Montana addressed to the defendants Bert Nelson, Bert Lish, Avery Stevens, P. W. Sorenson, M. C. Pierce, B. W. Alexander, Lloyd McVey, Theodore Knutson and Mrs. Caroline McKeever as "Present owners of Deschamps-McDonald ditch" a communication in which they "are requested to have constructed by August 1, 1935, a suitable headgate at the point where your private ditch taps Post Creek and at some practicable place a proper measuring box, weir or other appliance for the measurement of the water flowing in your ditch which can be inspected and measurements made by you and the employees of this service, with the purpose of determining that no more of the water is diverted for the irrigation of your lands than allowed, as above set forth, by

the Secretary'', (Defendants' Exhibit 35); and said defendants, and each and all of them, have wholly failed and refused and continue to refuse to comply with said request, or any part of it;

69: In diverting and using said water so used for irrigating their lands, as aforesaid, the defendants have deprived the Flathead Irrigation Project of that amount of water which the project wished to use in its system for distribution to other lands lying under its canals, including lands not allotted to Indians of the Flathead Indian Reservation in Montana, and, that said water so diverted is, and at all times has been, necessary for the successful cultivation of lands not allotted to Indians of the Flathead Indian Reservation in Montana lying under the Flathead Irrigation Project system and the growing of crops thereon; [142]

70: It is not shown that the plaintiff has suffered great or irreparable or any injury, loss or damage by reason of the diversion by the defendants, or either of them, of water from Post Creek through said McDonald-Deschamps and said Magee-Minesinger ditches, or either of them, to defendants' said lands for use, and actually used, as aforesaid:

71: Prior to May 1, 1905, said McDonald-Deschamps ditch was dug and constructed from Post Creek, on the Flathead Indian Reservation in Montana, to the lands of Indian allottees:

Duncan McDonald, Allotment No. 561, described as the East Half of the Northeast Quarter (E1½ of

NE $\frac{1}{4}$) of Section 16, Township 19 North of Range 19 West of the Montana Meridian, Montana, now owned by the defendant B. W. Alexander, and upon which said defendant is, and at all times in the irrigating season of the year 1935, was using water from said ditch to properly irrigate said lands;

Florence McDonald, Allotment No. 560, described as the Southwest Quarter of the Northeast Quarter (SW $\frac{1}{4}$ of NE $\frac{1}{4}$) and the Northwest Quarter of the Southeast Quarter (NW $\frac{1}{4}$ of SE $\frac{1}{4}$) of Section 16, in Township 19 North of Range 19 West of the Montana Meridian, Montana, now owned by Clarence L. McVey and Lillian L. McVey as successors in interest of the defendant Beckwith Mercantile Company of St. Ignatius, Montana, a corporation, and upon which the defendant John A. Hazel is, and at all times in the irrigating season of the year 1935 was, using water from said ditch to properly irrigate said lands;

Mary C. McDonald, Allotment No. 559, described as the Southeast Quarter of the Northwest Quarter (SE $\frac{1}{4}$ of NW $\frac{1}{4}$) and the Northeast Quarter of the Southeast Quarter (NE $\frac{1}{4}$ of SE $\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West of the Montana Meridian, Montana, now owned by the defendants Theodore Knutson and Edna I. Knutson, his wife, and upon which said defendants are, and at all times in the irrigating season of the year 1935 were, using water from said ditch to properly irrigate said lands; [143]

Frank Fiddler, Allotment No. 785, described as the West Half of the Southwest Quarter ($W\frac{1}{2}$ of $SW\frac{1}{4}$) of Section 16, in Township 19 North of Range 19 West of the Montana Meridian, Montana, now owned by the defendant P. W. Sorensen, and upon which said defendant is, and at all times in the irrigating season of the year 1935 was, using water from said ditch to properly irrigate said lands;

William Deschamps, Allotment No. 781, described as the Southwest Quarter of the Northwest Quarter ($SW\frac{1}{4}$ of $NW\frac{1}{4}$) of Section 16, in Township 19 North of Range 19 West of the Montana Meridian, Montana, and the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}$ of $NE\frac{1}{4}$) of Section 17, in Township 19 North of Range 19 West of the Montana Meridian, Montana, now owned by the defendant Avery A. Stevens, and upon which said defendant is, and at all times in the irrigating season of the year 1935 was, using water from said ditch to properly irrigate said lands;

Edward Deschamps, Allotment No. 783, described as the North 30 acres of the Northeast Quarter of the Southeast Quarter ($NE\frac{1}{4}$ of $SE\frac{1}{4}$) of Section 17, in Township 19 North of Range 19 West of the Montana Meridian, Montana, now owned by the defendant Avery A. Stevens, and upon which said defendant is, and at all times in the irrigating season of the year 1935 was, using water from said ditch to properly irrigate said lands;

Edward Deschamps, Allotment No. 783, described as the South 10 acres of the Northeast Quarter of the Southeast Quarter of the Southeast Quarter ($NE\frac{1}{4}$ of $SE\frac{1}{4}$ of $SE\frac{1}{4}$) of Section 17, Township 19 North of Range 19 West of the Montana Meridian, Montana, now owned by the defendant Meil C. Pierce, and upon which said defendant is, and at all times in the irrigating season of the year 1935 was, using water from said ditch to properly irrigate said lands and other lands owned and cultivated by him in connection therewith; and,

Oro Deschamps, Allotment No. 784, described as the [144] Southeast Quarter of the Southeast Quarter ($SE\frac{1}{4}$ of $SE\frac{1}{4}$) of Section 17, in Township 19 North of Range 19 West of the Montana Meridian, Montana, now owned by the defendant Bert Lish, and upon which said defendant is, and at all times in the irrigating season of the year 1935 was, using water from said ditch to properly irrigate said lands:

72: In the spring of the year 1907 said Magee-Minesinger ditch was dug and constructed from Post Creek to the lands of Indian allottees:

John Minesinger, Allotment No. 690, described as the South Half of the Northwest Quarter ($S\frac{1}{2}$ of $NW\frac{1}{4}$) of Section 17, Township 19 North of Range 19 West, Montana Meridian, Montana, now owned by the defendants John Minesinger and Ada B. Minesinger, his wife, and upon which said defendants are, and at all times in the irrigating reason

of the year 1935 were, using water from said ditch to properly irrigate said lands;

James Waymack, Allotment No. 689, described as the West Half of the Southwest Quarter ($W\frac{1}{2}$ of $SW\frac{1}{4}$) of Section 17, in Township 19 North of Range 19 West, Montana Meridian, Montana, now owned by the defendant Thomas Wald, and upon which said defendant is, and at all times in the irrigating season of the year 1935 was, using water from said ditch to properly irrigate said lands; and,

Emma Magee, Allotment No. 688, described as the East Half of the Southeast Quarter ($E\frac{1}{2}$ of $SE\frac{1}{4}$) of Section 18 in Township 19 North of Range 19 West, Montana Meridian, Montana, now owned by the defendant Thomas Wald, and upon which said defendant is, and at all times in the irrigating season of the year 1935 was, using water from said ditch to properly irrigate said lands;

73: On April 9, 1910, the United States of America issued and delivered a fee simple patent to Margarita Gariepy, an Indian of the Flathead Reservation in Montana, for those [145] certain lands particularly described as the East Half of the Southwest Quarter ($E\frac{1}{2}$ of $SW\frac{1}{4}$) of Section 26 in Township 20 North of Range 21 West of the Montana Meridian, Montana. This patent contained the following provision: "Now, Know Ye that the United States of America in consideration of the premises, has given and granted, and by these presents does give and grant unto the said Margarita Gariepy, and to her heirs, the lands above

described. To have and to hold the same together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said Margarita Gariepy, her heirs and assigns forever." (Interveners' Exhibit No. 16);

74: At all times on and after December 10, 1936, the Intervener Dennis A. Dellwo has been, and he now is, the owner and in possession and control of said lands, and each and every part and portion of the same, as successor in interest of said Margarita Gariepy; (Interveners' Exhibit No. 16);

75: Said land is situated within the boundaries of the Flathead Indian Reservation in Montana and is included within the Flathead Irrigation District;

76: By an Order and Decree duly given, made and entered of record on August 26, 1936, in the District Court of the Fourth Judicial District of the State of Montana, in and for the Counties of Lake and Sanders, the Intervener Flathead Irrigation District, a corporation, was created and established as an irrigation district under the laws of the State of Montana, and particularly those laws providing for the creation of irrigation districts; (Secs. 7166, 7167 and 7168, R.C.M. 1921, as amended);

77: All the lands within the Flathead Irrigation District are lands within the Flathead Indian Reservation in Montana;

78: On May 12, 1928, in pursuance of the Act of [146] April 28, 1904, (33 Stat. 302), and Acts ammendatory thereto or supplemental thereto, and

particularly the Act of May 10, 1926, (44 Stat. 417, 464-466), and the Act of January 12, 1927, (44 Stat. 934, 945), the United States of America and the Flathead Irrigation District, a corporation, one of the interveners herein, entered into a certain repayment contract between said Flathead Irrigation District and the United States of America, which is in evidence here as Interveners' Exhibit No. 15);

79: Among the Acts amendatory of and supplemental to the Act of April 23, 1904, (33 Stat. 302), is the Act of May 29, 1908 (35 Stat. 444), which provides for the the building of irrigation systems in Indian reservations, including the Flathead Indian Reservation in Montana, and the opening for settlement and the settlement of lands upon the Flathead Indian Reservation in Montana after the allotment of lands to Indians of the Flathead Reservation had been completed (35 Stat. 448-449), and expressly provides as follows: "The land irrigable under the systems herein provided which has been allotted to Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for construction of such irrigation systems."

80: Another of the Acts ammendatory of and supplemental to the Act of April 23, 1904, (33 Stat. 302), is the Act of June 21, 1906, (Stat. 325), which provides in part as follows:

"Section 19. That nothing in this Act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land

is granted by the Act, of the use of waters appropriated and used by them for the necessary irrigation of their land or for domestic use or of any ditches, dams, flumes or reservoirs constructed and used by them in the appropriation and use of said waters." (34 Stat. pp. 354-355);

81: On July 8, 1907, one Robert S. Stockton, an Engineer employed by the United States Reclamation Service, was ordered by H. N. Savage, Supervising Engineer, to proceed to the [147] Flathead Indian Reservation, Montana, and make a reconnaissance survey, to show what lands there would be irrigable, what waters were available, and what other natural resources were there which could be taken care of in the proposed opening of the Flathead Indian Reservation in Montana. Mr. Stockton arrived on the Flathead Indian Reservation in Montana on July 17, 1907, or shortly after. His duties were not to look into any irrigation that might be there but to see what land could be irrigated and what probability of power there might be, in order to make a general report which would be the basis of the construction of the project by the United States Reclamation Service.

Surveys were made by the plane table level and stadia work, maps were drawn, and a report was made on November 12, 1907. This report was put in evidence as Plaintiff's Exhibit No. 2.

Among other things this report shows, and the Court finds:

(1) That in general seventy-eight thousand acres of land on the Flathead Indian Reservation in Montana can be irrigated by gravity and fifty-seven thousand acres by pumping schemes;

(2) The reservation is about sixty miles long and thirty-five miles wide, and is divided *typographically* into the Mission Valley, the Jocko Valley and the Little Bitter Root Valley;

(3) The Mission Valley lies between Pend d'Oreille River and the Mission Range and extends from Flathead Lake to the Jocko Divide. This valley is about three thousand feet above sea level, has good soil and a climate suitable for small fruit, apples, grain and grasses. The most striking features of the country, and which influence the climate and conditions, are Flathead Lake and the Mission Range; [148]

(4) The Indians having tribal rights number 2356 and consist of Flatheads, Pend d'Oreilles, Kootenais and Spokanes. Many of these Indians are French-Canadian breeds, and some are whites who have married squaws or breeds, and these have some fine farms on the reservation;

(5) The soils of the Mission Valley vary from pure sand to sandy loam, with some white clay soil along the river, while along the range the soil is mixed with the black mold of the forest. The soils, while all would be classed as easily worked by the farmer, seemed to stand erosion well. Some of the ditches now constructed are on very heavy grades, yet do not wash out;

(6) Mission Creek, Post Creek and Crow Creek are the three main streams in the south end of the Mission Valley; they all head in the Mission Range and flow across the valley and ultimately into the Pend d'Oreille. The drainage area of these streams is not large but the flow is large and keeps up well on account of the high and forest covered mountains.

(7) The discharge of Mission Creek, Post Creek and Crow Creek, in acre feet, for the period commencing September 21, 1906, is as follows:

Mission Creek :

1906	September 21-30	1080
	October	3110
	November	2860
	December	2240
	Total acre feet.....	9290
1907	January	1320
	February	1070
	March	1530
	April	2400
	May	6400
	June	14000
	July	18000
	August	6580
	September	4210
	October	2040
	Total acre feet.....	57500
	Grand Total	66790

Post Creek :

1906	September 21-30	1130
	October	3410
	November	3900
	December	3090
Total acre feet.....		11530

1907	January	895
	February	
	March	2360
	April	2920
	May	6580
	June	15400
	July	15700
	August	5160
	September	3750
	October	2600
Total acre feet.....		55365

Grand Total66895

Crow Creek :

1906	September 21-30	444
	October	1840
	November	3060
	December	2100
Total Acre feet.....		7474

1907	January	1540
	February	922
	March	2640
	April	2810
	May	9470
	June	18300
	July	12400
	August	3900
	September	2530
	October	1630
Total acre feet.....		56142

Grand Total63616; and,

(8) The Mission Creek system covers 21,000 acres of irrigable land lying between Mission Creek on the South and Post Creek on the North. The Post Creek and Crow Creek system covers 33,000 acres net of the bench lands between Post Creek and Crow Creek. The water supply comes from Post Creek, regulated by a reservoir at Lake McDonald, and the canal lines surveyed are the "C" and "E" lines from Post Creek and the "F" line from Crow Creek.

The "C" line canal carries water from Post Creek, a short distance above the upper stage road, and carries water to the lower bench down near the Pend d'Oreille River. The net acreage is 12,000 acres. [150]

The "E" line out of Post Creek carries water across to Marsh Creek, and from thence on to the land at a high level. This system, together with extra water from Crow Creek, covers 15,000 acres.

The "F" line canal takes water from Crow Creek and has a capacity of 100 cubic feet of water per second.

A summary of the Mission Valley gravity systems as proposed is as follows:

Lands.	Gross Acres.	Net Acres.
Area under "A" Line, Mission Creek.	7,878	7,500
" " "B" " " "	10,975	10,000
" " "D" " " "	4,884	3,500
	<hr/> 23,737	<hr/> 20,000

Area under "C" Line, Post Creek,	15,908	12,000
" " "E" " " "	20,692	15,000
" " Crow Creek Lines,	7,888	6,000
	<hr/>	<hr/>
	44,498	33,000
Total Mission Valley Gravity Lines,	68,235	53,000;

With reference to the allotment of lands it is stated in this report:

A law was approved by Congress April 23, 1904, which provides for the allotment of the lands to the Indians having tribal rights, the survey of the reservation, and the appraisement of all the lands not allotted, except lands classed as mineral. * * *.

(Here were copied Sections 5 and 6 of the Act.)

Land is reserved for government purposes and for the Catholic societies, and where Sections 16 and 36 are allotted the State may take other lands, but the Indians must be paid for such lands at the rate of \$1.25 per acre. The lands not allotted or reserved shall be opened to settlement by a proclamation of the President under the general provisions of the homestead, mineral and townsite laws. That the price of said land shall be the appraised value thereof as fixed by the commission. * * * . Mineral entries can be made anywhere except on allotted lands [151] if the facts warrant such entry. Lands open to settlement under this Act and remaining undisposed of at the expiration of five years from the taking effect of this Act shall be sold and disposed of to the highest bidder for cash under the rules and regulations of the Secretary of the

Interior, at not less than their appraised value, and in tracts not to exceed 640 acres to any one person.

82: The allotting of lands on the Flathead Indian Reservation in Montana was done by Col. John K. Rankin to 2356 Indians, or those claiming tribal rights as such, each person receiving 80 acres of farm land or 160 acres of grazing land. The Indians were allotted, as far as possible, according to the occupancy and preference of the Indians and cover most of the choicest lands of the Reservation;

83: All of the lands owned, controlled and occupied by the defendants in this action in equity, or either or any of them, were allotted as farm lands, and, at the time such allotments were made the lands allotted were occupied by an Indian of the Flathead Reservation in Montana, to whom the allotment was made, and an undetermined part of each of the allotments was then farmed by the Indian of the Flathead Reservation in Montana to whom such lands were allotted, and irrigated to an undetermined extent with waters conveyed from Post Creek on the Flathead Indian Reservation in Montana, through the McDonald-Deschamps Ditch or the Magee-Minesinger Ditch, to the land irrigated on such allotments;

84: The McDonald-Deschamps Ditch had, and has, a carrying capacity of 4.7 second feet of water;

85: The Magee-Minesinger Ditch had, and has, a carrying capacity of 3.1 second feet of water;

86: A second foot of water is that flow of water which will fill a cubic foot of space in one second

of time, which, flowing for 24 hours, makes 1.98 acre feet of water; [152]

87: The whole irrigable area of the Flathead Irrigation Project system on the Flathead Indian Reservation in Montana, as now constituted, is 138,000 acres;

88: The whole irrigable area of lands within said Project allotted to Indians of the Flathead Reservation in Montana in severalty is close to 70,000 acres;

89: The Flathead Irrigation Project system on the Flathead Indian Reservation in Montana, as constructed, consists of three quite definitely separated areas known as the Jocko, the Mission Valley, and, the Camas Divisions;

90: All of the lands owned, controlled or occupied by the Defendants in this action in equity and the Intervener D. A. Delwo, or either or any of them, are located in the Mission Valley District within said Project;

91: The Camas Division of said Project is fully 25 miles West of Polson; is across the Flathead River on the Flathead Indian Reservation in Montana from the lands owned, controlled or occupied by the Defendants in this action in equity and the Intervener D. A. Delwo, or either or any of them, and is not pertinent to the case at bar inasmuch as it has an entirely different source of water supply;

and it is not possible to intermingle the waters which are used on the Mission Valley Division and those which are used on the Camas Division of said Project system;

92: The Jocko Division consists of around 13,000 acres of irrigable land in the vicinity of Arlee on the Flathead Indian Reservation in Montana—that is South of the hills between Dry Creek and the Jocko River, and also a small area in the neighborhood of Dixon on the Flathead Indian Reservation in Montana of a few hundred acres;

93: This Division has a separate and distinct source of water supply from the main Mission Valley system of water [153] supply. The only connection that the Jocko Division has with the Mission Valley Division of said Project system is that flood or excess waters are taken from the middle fork of the Jocko River and carried by the Taber Feed Canal to Taber Reservoir and there stored, and may, if not needed in the Jocko Division, be used in the Mission Division of said Project system, if needed there;

94: While it is not impossible, it would be extremely difficult and not practicable to use any of the water from the Mission Valley Division on the Jocko Division of said Project system for the reason that the storages in general are lower;

95: The present irrigable area of land in the Mission Valley Division of the Flathead Irrigation Project system on the Flathead Indian Reservation

in Montana is 65,073 acres, of which the irrigated acreage on September 1, 1935, was 54,364 acres;

96: The amount of water available in acre feet per acre on the Mission Valley Division of the Flathead Irrigation Project system on the Flathead Indian Reservation in Montana, if only Indian allotments are considered, in the years 1935 to 1939, is as follows:

1935.....	2.34;
1936.....	2.38;
1937.....	1.78;
1938.....	2.118; and,
1939.....	2.112;

the average being.....2.16;

97: This Division is a more or less self-contained unit insofar as the irrigable lands and the water supply for those lands are concerned;

98: The amount of water available in acre feet per acre on the Mission Valley Division of the Flathead Irrigation Project system on the Flathead Indian Reservation in Montana is [154] not sufficient to produce crops to the full extent of the soil thereof if only Indian allotments located in that Division of said Project system are considered;

99: The irrigable area of the Indian allotments on the Flathead Indian Reservation in Montana is close to 70,000 acres;

100: The natural flow of water on the Flathead Indian Reservation in Montana is not sufficient to irrigate the irrigable area of all of the Indian allot-

ments on that Reservation to the extent necessary to produce crops to the full extent of the soil thereof, though there is sufficient water to raise good crops on all of the irrigable area of Indian allotments on the Flathead Indian Reservation in Montana if a large part of the water stored annually in the Flathead Irrigation Project system during the spring run-off and after the irrigating season is over in the fall is added to natural flow during the irrigating season on the Flathead Indian Reservation in Montana;

101: The total capacity of the storage reservoirs in the Mission Valley Division of the Flathead Irrigation Project system is about 98,000 acre feet;

102: The maximum storage ordinarily occurs above the first of July, and on July 1, 1939, 85,000 acre feet of water was in storage; and,

103: The "Amended Schedule of Lands in the Flathead Indian Reservation Subject to Entry September 1, 1910," ((Defendants' Exhibit No. 33), is addressed to persons holding numbers assigned to them under the proclamation of the President of the United States of America opening lands in the Flathead Indian Reservation in Montana to entry; described the lands which will be subject to selection by them on September 1, 1910; outlines the procedure to be followed by them in making their selections; and, contains the following warnings:

[155]

"The Government is now constructing irrigation

works from which the farm units will be irrigated as far as possible, but it cannot at this time be told what part or how much of any particular unit can be furnished with water. It is probable that water can be furnished to only a small portion of some of these units, and it is possible that there will be no water at all for some of them, nor can it be told now when the water will be ready for any of these units, as the development of the irrigation projects has not yet proceeded far enough to enable the giving of definite information on this subject at this time. All applicants must bear this fact in mind and make their selections accordingly, as they will act upon their own responsibility and without any guarantee from the Government, and the fact that water has not or cannot be furnished will not excuse any entryman from a full compliance with the requirements of the law as to residence, cultivation, and the payment of the Indian price. * * *.”

CONCLUSIONS OF LAW

From the foregoing facts the Court draws the following legal conclusions:

1: The waters flowing on the Flathead Indian Reservation in Montana were impliedly reserved to the Indians by the Treaty of July 16, 1855;

2: The United States of America became a trustee holding the legal title to the land and waters on the Flathead Indian Reservation in Montana for the benefit of the Indians of that Reservation;

3: Being reserved no title to the waters on the Flathead Indian Reservation in Montana could be acquired by anyone except as specified by Congress;

4: The Act of May 29, 1908, Sec. 9, 35 Stat. 448-449, allocated to each parcel of irrigable land on the Flathead Indian Reservation in Montana allotted to an Indian in severalty a right to the use of such waters on the Flathead [156] Indian Reservation "as may be required to irrigate such land";

5: In the event that the supply of water on the Flathead Indian Reservation in Montana is insufficient to furnish that amount of water to all irrigable lands allotted to Indians on that Reservation in severalty the provisions of the general allotment act (Act of February 8, 1887, c. 119, Sec. 7, 24 Stat. 390; Sec. 381, Title 25, U. S. C. A.) requiring "just and equal distribution" of the water on said Reservation applies;

6: No right to the use of water on the Flathead Indian Reservation in Montana could be, or has been, acquired by the United States of America, or anyone else, by prior appropriation pursuant to local statute or custom;

7: Section 19 of the Act of June 21, 1906, 34 Stat. 325, 355, granted nothing, but is a saving clause;

8: When an allotment of irrigable land on the Flathead Indian Reservation in Montana was duly made to an Indian of that Reservation and it was

thereafter conveyed by him in fee the right to the use of such an amount of water "as may be required to irrigate such land", if the water available is sufficient to supply all others similarly situated, whether an Indian allottee or the successor in interest of an Indian allottee, with that amount of water for use on allotted irrigable lands in the Flathead Indian Reservation in Montana, passed to the owner of such land; and, in the event that the supply of water is insufficient to furnish that amount of water to the irrigable lands on the Flathead Indian Reservation in Montana allotted to Indians of that Reservation in severalty the Indian allottee, and his successor in interest, acquired and continues to have the right to a "just and equal distribution" of the waters on the Flathead Indian Reservation in Montana;

9: By Section 7 of the Act of February 8, 1887, C. 119, 34 Stat. 390; Sec. 381, Title 18, U. S. C. A., the Secretary of the Interior was authorized to prescribe rules and regulations to secure a just and equal distribution of the water on the [157] Flathead Indian Reservation in Montana among the Flathead Indians; but, he was not thereby, or by any Act of Congress, or otherwise or at all, authorized by rule, regulation or otherwise to deprive any allottee or the successor in interest of any allottee of irrigable lands in the Flathead Indian Reservation in Montana of the right to the use of such an amount of water "as may be required to irrigate

such land", or to a "just and equal distribution" of the waters on the Flathead Indian Reservation in Montana;

10: Adoption by the Secretary of the Interior of plans for irrigation projects to serve certain irrigable lands on the Flathead Indian Reservation in Montana was not enough to indicate a purpose to exclude all other land from participation in essential water and thereby destroy the equal interest guaranteed by the Treaty of July 16, 1855:

11. The contentions of the Plaintiff and the Interveners herein that prior to the Treaty of July 16, 1855, all rights in and to the waters of the streams on the Flathead Indian Reservation in Montana and their tributaries were the property of the Plaintiff; that all such rights were by said Treaty reserved to the Plaintiff and have never been relinquished; that no one else—Indian or White—has ever had the right to divert or use any of said waters without Plaintiff's consent; that no such right was conveyed to or acquired by any patentee of allotted lands in the Flathead Indian Reservation in Montana, or their successors in interest; and that, in diverting and using said waters for the irrigation of their lands the Defendants herein were trespassers, are unsupported by authority;

12: The waters flowing in the streams on the Flathead Indian Reservation in Montana and their tributaries were reserved by the Treaty of July 16,

1855, to the individual Indians of the Flathead Tribe and not to the Tribe, and under that Treaty [158] each member of the Flathead Tribe of Indians secured a vested right in the use of sufficient water to irrigate his irrigable lands in said Reservation to the full extent of the soil thereof, and such right had priority as of July 16, 1855; and

13: What right, if any, the Plaintiff, the Defendants and the Interveners herein, or either or any of them, may have to divert or use the waters of the streams flowing in the Flathead Indian Reservation in Montana and their tributaries cannot be determined in this action in equity. Such a determination would directly and materially affect all owners of land within the Reservation, many of whom are not parties to this action in equity.

It follows that it must be, and it is hereby, ordered:

That the complaint in this action be dismissed without prejudice; and,

That the complaint in intervention herein be dismissed without prejudice.

Judgment will be entered accordingly.

Done in open court at Butte, Montana, July 31, 1941.

JAMES H. BALDWIN,

United States District Judge
in and for the District of
Montana.

See:

Winters v. United States, 207 U. S. 564;
United States v. Powers, CCA 9th C., 94 Fed.
2nd 783;
United States v. Powers, et al., 305 U.S. 527;
United States v. McIntire, et al., CCA 9th
C., 101 Fed. 2nd. 650.

[Endorsed]: Filed July 31, 1941. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.
[159]

Thereafter, on August 29th, 1941, Judgment was
duly entered herein, in the words and figures fol-
lowing, to wit: [160]

[Title of District Court and Cause.]

JUDGMENT.

This cause came on regularly for trial before the
Court sitting without a jury on May 6, 1940 and
was concluded on May 8, 1940; the Honorable John
B. Tansil, Attorney of the United States for the
District of Montana, and the Honorable Kenneth
R. L. Simmons, District Counsel, Indian Service
appeared as Attorneys for the Plaintiff; Mr. Lloyd
I. Wallace appeared for the Defendants and Mr.
Russell E. Smith appeared for the Interveners; and
the Court having heard the testimony and having
examined the proofs offered by the respective parties
and the Court being fully advised in the premises

and having filed herein its Findings of Fact, Conclusions of Law and Order and having directed that judgment be entered in accordance therewith; now therefore, by reason of the law and the findings aforesaid,

It Is Hereby Ordered, Adjudged and Decreed:

1. That the Complaint in this action be and the same is hereby dismissed without prejudice;

2. That the Complaint in Intervention herein be and the same is hereby dismissed without prejudice;

3. That the Defendants have judgment against the Interveners, Flathead Irrigation District, a Corporation, and Dennis A. Dellwo, for their costs herein taxed in the sum of One Hundred Fifty-four & 70/100 Dollars (\$154.70).

Dated: August 28, 1941.

JAMES H. BALDWIN,

United States District Judge
in and for the District of
Montana.

[Endorsed]: Filed August 28, 1941. Entered August 29, 1941. C. R. Garlow, Clerk, U. S. District Court, District of Montana. [161]

That on February 13th, 1942, Transcript of the Evidence and Proceedings at the trial of the cause was filed herein, in the words and figures following, to wit: [162]

[Title of District Court and Cause.]

Transcript of Testimony and Proceedings at the Trial at Missoula, Montana, on May 6, 7 and 8, 1940, before the Honorable James H. Baldwin, Judge.

Appearances:

For Plaintiff:

John B. Tansill,

U. S. District Attorney for Montana.

Kenneth R. L. Simmons,

District Counsel Indian Service.

For Defendants:

Mr. Lloyd I. Wallace.

For Interveners:

Mr. Russell Smith. [163]

[Title of District Court and Cause.]

TRANSCRIPT.

Be It Remembered: That the above entitled cause came regularly on for trial at Missoula, Montana, at ten o'clock a. m. on Monday, the sixth day of May, 1940, before the Honorable James H. Baldwin, Judge, sitting without a jury. Plaintiff was represented by John B. Tansill, United States District

Attorney for Montana, and Kenneth R. L. Simmons, District Counsel Indian Service. Defendants were represented by Mr. Lloyd I. Wallace of Polson, Montana; and the interveners were represented by Mr. Russell E. Smith, of Missoula, [168] Montana.

And thereupon the following proceedings were had and taken and the following evidence and none other was introduced:

The Court: Number 1529, United States of America against B. W. Alexander and others, Flathead Irrigation District and Dennis A. Dellwo, interveners, are the parties ready?

Mr. Tansill: We are ready, your Honor.

Mr. Smith: Come now, your Honor, the interveners, Dennis A. Dellwo and the Flathead Irrigation District, and ask leave pursuant to stipulation of counsel on file, to amend Paragraph I of the complaint by changing the description of the land in the same. I may say to the Court that at the time the bill in intervention was filed the land was correctly described but subsequent to the filing of the bill, and just recently, we discovered that this particular land described had been transferred out of the ownership of one of the interveners, and we ask that another tract of land at present owned, be substituted for that same tract. I may say the same issues arise.

The Court: And the answers to the original bill shall stand as answers to the amended bill?

Mr. Simmons: The answer of the government is, your Honor.

Mr. Wallace: And the answers of the defendants, your Honor.

The Court: Very well, let the record show that pursuant to stipulation of counsel for the respective parties the amendment is allowed; and let the record further show that the allowing of the amendment is upon condition, agreed to by all parties to the action, that the issues framed by the answers [169] to the original complaint shall be considered as framed by the answers now on file, with reference to the amended complaint.

Mr. Simmons: At this time, your Honor, the plaintiff asks leave of Court to amend the complaint in certain minor particulars. . . .

The Court: Very well, we will continue this case until October.

Mr. Simmons: Well of course this is very minor and there has been no objection raised by counsel for either the interveners or defendants.

The Court: If it is very minor why the need for it?

Mr. Simmons: We will withdraw the motion, your Honor.

Mr. Wallace: May it please the Court, there is a matter which seems to be missing in the answer of the defendants; I have discovered apparently an omission from the original answer filed to the original bill of complaint, and I would like to add a paragraph, pursuant to stipulation which all of the counsel representing the parties have signed, and the stipulation is on file, and with the permission of

the Court I would like to ask leave to amend the original answer by adding a new paragraph, pursuant to the stipulation secured, denying the allegations in the original bill of complaint that were not specifically denied in the original answer.

The Court: Well we find here a case that was begun on the 23 day of April, 1936, something over four years ago, and we have been dealing with that case at every term of court and out of term; the case has been set for trial for more than a month; the Judge presiding has come into court after having determined what the issues are as made by the pleadings now on file, which is essential to the proper trial [170] of the case. The parties come here now and pursuant to agreement by all parties, very probably change the deal; the Court has to back-track and again examine all the pleadings, to find out what has to be tried. You say these are minor matters, but if they are minor matters they are of no importance; on the other hand they may change the entire law controlling the action. However, I suppose we have to try cases, and I suppose we have to try them on a legitimate theory; still, I will grant leave to each of the parties to make the amendments of any kind to any pleading in the case, between now and two o'clock; the court will stand in recess until then.

And thereupon recess was had until 2:00 o'clock p. m. of said day, when the trial was resumed.

The Court: For the record—the contention of the defendants, Beckwith Mercantile Company, a

Montana corporation, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorenson, Avery A. Stevens, Meil C. Pierce, Bert Myers Nelson, and Thomas Wald, that the complaint in intervention herein fails to state a claim against said defendants, as alleged in the first defense in their joint and several answers to the complaint in intervention herein, is overruled in its entirety.

Mr. Wallace: May it please the Court, the words "Admit, deny and" should not be in this answer, and I move that the words be stricken therefrom.

The Court: Very well; on motion of the attorney for the defendants Beckwith, Hazel, Knutson, Sorenson, Stevens, Pierce, Nelson and Thomas Wald, the words "Admit, [171] deny and," being the first three words in line 12 on page 6, under the designation "Third Defense," are stricken.

Well, have the parties agreed upon the amendments, and made them?

Mr. Simmons: If the Court please we have decided not to make any of the amendments contained in the stipulation, and stand on our complaint.

Mr. Smith: The interveners have no request for amendments other than as requested this morning.

The Court: Very well, proceed.

And thereupon an opening statement was made by Mr. Simmons on behalf of the plaintiff, followed by an opening statement by Mr. Wallace on behalf of the defendants, and thereafter an opening statement by Mr. Smith on behalf of the interveners.

The Court: Very well, call the first witness.
And thereupon the following evidence was introduced by the plaintiff on behalf of its case in chief:

ROBERT S. STOCKTON

was called as a witness in behalf of the plaintiff and having been first duly sworn testified as follows:

Direct Examination

By Mr. Simmons:

Q. Will you state your name?

A. Robert S. Stockton.

Q. Where do you live at the present time, Mr. Stockton?

A. Near Thompson Falls, Montana.

Q. And what is your occupation? [172]

A. I am a retired engineer and live on a farm.

Q. Were you ever employed by the United States as an engineer?

A. Yes, I was employed by the United States Reclamation Service from 1903 to 1911.

The Court: Is it intended that I shall be furnished with a transcript of the testimony?

Mr. Simmons: Yes sir.

The Court: I can depend on that?

Mr. Simmons: Yes you certainly can, your Honor. I might say that we have adopted a policy of having all of our exhibits appear in the transcript, which we intend to do here, so that they will all be before you—there are numerous exhibits, and you will have them all in one book, so that you won't have to look for them.

(Testimony of Robert S. Stockton.)

The Court: Very well, but it is a little more convenient to have them separately.

Q. In your capacity, Mr. Stockton, as a government engineer, were you detailed at any time to the Flathead Reservation? A. Yes, in 1907.

Q. And what was the detail?

A. I was ordered by H. N. Savage, Supervising Engineer, to proceed to the Flathead Indian Reservation and make a reconnaissance survey, to show what lands there would be irrigable, what water power was available, and what other natural resources were there, which could be taken care of in the proposed opening of the reservation, which had been arranged between Mr. Savage and Senator Dixon.

Q. When did you arrive on the Flathead Reservation?

A. I arrived there either on July 17 or shortly after, [173] in 1907.

Q. And will you tell in a general way what you first did when you arrived there?

A. We shipped a car of surveying equipment, and two small parties were put in the field; the idea was to outline the areas of land which existed on the reservation that would be available for irrigation. My duties were not to look into any irrigation that might be there but to see what lands could be irrigated and what possibility of power there might be, in order to make a general report, which would be the basis of the construction of the proj-

(Testimony of Robert S. Stockton.)

ect by the United States Reclamation Service. Those two parties, the surveys were made by a plane table level and stadia work, the main bodies of land on the reservation, and the maps were drawn, and a report made which was dated November 12, 1907, and our work—most of the plane table work—was done around the falls of the Flathead River in connection with power development; the stadia work was in looking up reservoirs and in running the required lines across the open lands of the reservation. At that time the Indians were congregated along the streams and slopes along the edge of the timber at the foot of the mountains, where there was a little more water.

Q. Well now will you describe generally what you observed there at that time in regard to irrigation development?

A. Well at that time there seemed to be little use of water on the lands; they were wild lands; there were a few ditches on the Jocko Division, that had been built by the Indian Service, which were apparently used for wild growing and hay lands; there were a few gardens and fields around St. Ignatius apparently that were getting a little water, and there [174] was a ditch near the Pablo place, running across the road, apparently used for stock water. There was, as far as I could see, no real irrigation development. I mentioned in my report that no alfalfa was grown, or could be; the only farming of any magnitude that I noticed or that

(Testimony of Robert S. Stockton.)

I remember was the grain fields just south of Polson on the slope above the lake; there were wheat fields there, and 1907 was a wet year and there were very fair crops. Everything else on the reservation was apparently on a stock basis, and the Indians not doing any farming were doing a little stock raising and put up a little hay.

Q. Now Mr. Stockton, referring to this large map, marked plaintiff's offered exhibit 1, you will note on it a certain stream called Post Creek?

A. Yes, sir.

Q. Are you familiar with Post Creek, or were you familiar with Post Creek at the time you made this survey in 1907?

A. Yes I drove all over that country for two months, with a team, and directed these two parties, and was at that time familiar with Post Creek, Crow Creek and Mission Creek, and the other little creeks that run down from the mountains. There is a series of mountain ranges that runs north and south and the drainage lies to the west, and a very steep slope from the mountains down to the foot of the valley.

Q. Now in connection with your studies of the use of the waters of Post Creek, what recommendation, if any, did you make in your report that you prepared and sent to your superior officer?

A. Well we recommended that the irrigation system, proposed irrigation system, should be constructed to cover all the [175] lands that we had

(Testimony of Robert S. Stockton.)

outlined in our surveys, which were pretty much the lands colored on that map in white color, green and yellow; we run out trial lines which showed that those lines lie below the possible diversion of the various streams there, Post Creek, Crow Creek, Mission Creek and the Jocko River.

Q. Now Mr. Stockton have you been over the Flathead Irrigation Project in recent years?

A. I have been, and if I remember the different times, as far as I can remember, I was first there, after construction, in 1910, that date being fixed by the fact that I bought some land here near Missoula in 1910; and I visited the project in company with G. L. Davis, assistant engineer of the Reclamation Service. Then I visited the land—the project—again in 1918, when I was buying some more land down in this country.

Q. Now on those two trips to the project did you inspect the project work and inspect what is designated on that map as the Pablo Feeder Canal, on plaintiff's offered exhibit 1?

A. Yes—and I think it was the second time I was there—but anyway, one time I was there they had a small steam shovel at the north end of the Pablo Feeder Canal, which was working on that canal near the crossing of Mud Creek, and we drove over the project from St. Ignatius to this work on the canal.

Q. You understood the purpose of the Pablo Feeder Canal; could you briefly explain it?

(Testimony of Robert S. Stockton.)

A. The Pablo Feeder Canal was designed to make use of the fact that we had discovered that the slope of the country enabled a canal to be run almost north across the project or [176] the reservation lands, which would pick up all the water coming from the various small streams, Post Creek and Crow Creek and Mud Creek and so on, and that that was the most feasible way to establish an initial control of all the water and use it to the best advantage for the various lands that would be under it.

Q. You say to pick up all the water of the small streams; where do those streams arise?

A. In the Mission mountains.

Q. Now in your study of the use of the waters of Post Creek in 1907 what plan did you—what did you plan to do with those waters—how did you plan to use them—through what canal system did you plan to use them?

A. Well we laid out just a set of proposed canals and made an estimated supply to show that it was feasible to irrigate those lands and that they were under the water that was available, but that was only a mere reconnaissance on which the locating engineers could tie; they didn't use our lines at all, they didn't represent anything in connection with the construction work except that did show the feasibility of the construction works, and the lands that were outlined in our surveys are practically the lands that now exist under the constructed project;

(Testimony of Robert S. Stockton.)

and it was worked out largely in the territory between St. Ignatius and Polson, right in the big open area and on which at that time there was no fence, no fields, no anything else except the open prairie.

Q. You speak of a report which you submitted; how was this report submitted in 1907, when you made your investigation?

A. It was submitted to H. N. Savage, Supervising Engineer, [177] Northern Division, Reclamation Service.

Q. I hand you here plaintiff's offered exhibit 2, and will ask you to identify it?

A. Yes sir, I have examined this, and it is a correct photostat copy of the report which I made in 1907.

Q. It is a certified copy?

A. And this is a certified copy; I have read it through and I am sure that it is a proper copy.

Mr. Simmons: If the Court please I furnished the attorneys for the defendants copies of all of these exhibits; while I appreciate that I could go on at great length and examine Mr. Stockton as to the details of this offered exhibit, I think it would save the Court's time to introduce this as an exhibit, in evidence, and I now offer it as an exhibit in evidence, being a certified photostatic copy of the original report made to the Washington office by Mr. Stockton.

The Court: It will be admitted without objec-

(Testimony of Robert S. Stockton.)

tion; it will be considered read, and any party interested may at any time during the trial or the argument refer to and quote from this exhibit.

Plaintiff's Exhibit 2, being the document referred to, was thereupon received in evidence without objection, and is on file with and forms a part of the original exhibits in the case.

PLAINTIFF'S EXHIBIT 2

Exhibit No. 2 is a report of Robert S. Stockton, Project Engineer for the United States Reclamation Service, dated November 12, 1907, who in 1907 made a survey of the Flathead Indian Reservation for the purpose of determining the feasibility of irrigation and power development on the reservation. The report contains a general description of the soils, crops and climate of the reservation and opines that about 78,000 acres of the reservation could be irrigated by gravity and that about 57,000 acres by pumping. The report indicates that Mission Creek, Post Creek and Crow Creek are the three main streams in the south end of the Mission Valley, tables showing the discharge of these streams are shown. The report outlines in some detail a projected irrigation system for the reservation, including a dam at the falls of the Flathead river, a dam at Big Fork on the upper end of the Mission Valley Division, together with reservoir and canal systems which would distribute these waters. The report also shows a projected canal system for Mis-

(Testimony of Robert S. Stockton.)

sion Creek including the use of Lake St. Mary as a storage reservoir. The Post Creek and Crow Creek systems are likewise projected with three main canals being designated to carry the waters of Post Creek. This system includes a suggestion as to the possibility of using Lake McDonald as a storage reservoir. The report then covers the Jocko and Little Bitterroot divisions of the project. [549]

Mr. Smith: The interveners have no cross examination.

Cross Examination

By Mr. Wallace:

Q. Mr. Stockton, I believe you stated in your direction you had some instructions from Mr. Savage; were those instructions in writing? [178]

A. I had a letter officially instructing me to go on the reservation and make these surveys, dated July 8, 1907.

Q. I don't suppose you have those written instructions with you?

A. No, I haven't a copy of them here.

Q. And do you recall . . .

A. . . . That was just a formal letter of instructions; I had oral instructions, of course, as to just what I was to do.

Q. And you recall now, Mr. Stockton, there was nothing in those instructions about looking into

(Testimony of Robert S. Stockton.)

whatever private water right irrigation system may have been in existence at that time?

A. No, I wasn't instructed to look into any private water right irrigating system, all I was to do was to note that there was not much use of water in any private way.

Q. Well, while you were on the reservation in 1907 do you have any independent recollection now of these two ditches that are in dispute in this case, the Magee-Minesinger Ditch and the McDonald-Deschamps Ditch?

A. No, I don't think I could remember them; the only ditch I can remember that left the canal was the ditch that crossed the road near the Pablo place, and the ditches on the Jocko, I remember those.

Q. And so far as you remember those two ditches I just mentioned, may have been there?

A. They may have been there, yes, but I don't have any memory of them.

Q. And so far as you now know, or observed then, there may have been irrigation going on, in so far as pastures are [179] concerned?

A. Yes, most of the water that was developed was used for wild growing and pasture and small hay lands.

Q. And some wheat fields near Polson?

A. Yes, not irrigated land.

Q. I believe you stated you observed, when you went on the reservation, the Indians, generally speaking, were located pretty well along the streams where there was water running, and timber?

(Testimony of Robert S. Stockton.)

A. Yes.

Q. And settling there upon homesteads or something?

A. Yes.

Witness Excused.

GUY L. SPERRY

was called as a witness on behalf of the plaintiff and having been first duly sworn testified as follows:

Direct Examination

By Mr. Simmons:

Q. Your name is Guy L. Sperry?

A. Yes sir.

Q. And your occupation?

A. Engineer with the United States Government on the Flathead Project.

Q. How long have you been connected with the United States as an employee?

A. I was employed first by the government in 1909 on the Flathead.

Q. And what was your position then? [180]

A. Surveyman; and I have been employed on the reservation more or less continuously since that date, in the capacities of surveyman, junior engineer, assistant engineer, and project engineer.

Q. You are now the Project Engineer of the Flathead Project?

A. Yes sir.

Q. Since what date have you been project engineer?

(Testimony of Guy L. Sperry.)

A. Since June 1938; and I might add that during that period I was out of the service four years on this project and was detailed to the San Carlos project in Arizona for about a year and a half on two separate occasions.

Q. Have you been in active charge of this construction, and would you say practically all of the project works on the project during those years?

A. No, I wouldn't say I had been actively in charge of construction during all of those years.

Q. But you actively participated in some capacity or other?

A. I participated in practically all the construction during those years.

Q. Referring to plaintiff's offered exhibit 1, I will ask you if you have seen that map before?

A. Yes sir.

Q. Did you have it prepared?

A. Yes, I had that map prepared.

Q. Will you advise as to the manner of preparation?

A. The manner of preparation was to take a series of maps—the maps were regular project maps made in the course of the regular work . . .

Q. . . . As part of the project records . . . [181]

A. . . . As part of the project records; and there were several of these maps, and these maps were photographed and enlarged to double the scale, by the United States Forest Service here in Missoula, and assembled in this form from the regular proj-

(Testimony of Guy L. Sperry.)

ect records, and colored, for the purpose of reference for this particular trial, but the maps themselves, or all of the essential physical features, were made regularly in the course of the project work.

Q. And that was all done under your direction?

A. Yes sir.

Q. I will ask you if the location of the towns, the railroads, the farms, the irrigation ditches, project works, the streams and the rivers on that map, the locations as shown on that map, are approximately correct, as the locations which you know them from your actual knowledge of the country?

A. Yes sir.

Q. And your trips over the country based upon your 28 years of work and in that particular locality?

A. Yes sir, those are accurate, as far as I am aware.

Q. Will you state what the color in green represents on the map?

A. The green color on the map represents in general the irrigable portion of the area in what we designate as the Mission Valley Division; and the yellow area represents the irrigable area of the Jocko Valley; the unshaded areas that are intervening between the green shaded portions are, in general, areas that are too high for irrigation, too rough, or for some reason or other are not physically appropriate for irrigation—some of them could be irrigated, but in general the lands are too high or too rough for irrigation. [182]

(Testimony of Guy L. Sperry.)

Q. What does the orange color represent?

A. The orange color along the river represents the power withdrawals that is withdrawn for power purposes.

Q. On the map you have designated by pen the Magee-Minesinger Ditch and the McDonald-Deschamps Ditch; are those the ditches referred to in plaintiff's complaint? A. Yes sir.

Q. And the map shows that these ditches—that the Magee-Minesinger Ditch, designated on Plaintiff's Exhibit 1, runs through certain lands designated in purple—I think that is purple . . .

A. . . . That's right, that is the Magee-Minesinger Ditch, is the ditch further north and west, and the McDonald-Deschamps Ditch is the east ditch, of the gross area of the land indicated in blue.

Q. Now will you describe the sources of water supply used on the lands described in green on the map—that is, as I understand it, the lands in the Mission Valley Division of the Flathead Project?

A. May I point to the . . .

Q. . . . If you will point and identify it so that we can . . .

A. . . . The area in green, of course the eastern boundary of the area in green is what is designated as our Pablo Feed Canal—if I might briefly just outline the gross area of the reservation, it will just take a minute or two to explain the . . .

The Court: Very well, proceed.

(Testimony of Guy L. Sperry.)

A. (continued) . . . of the reservation amounts to approximately a million and a quarter acres; this includes all of the lands of the Flathead Project, and of course a [183] considerable area that is outside of the project system. In general the boundaries of the reservation follow the Mission range of mountains on the east, the peaks of these mountains on the east, up to a point northerly, approximately in an east and west line at the middle of Flathead Lake. The northern boundary extends west across into the Lone Pine area, which is settled about 25 miles west of the Pablo Reservoir, and extends to the top of the mountain range between the Little Bitter Root River and the Little Thompson River, which is off of the map here. It follows in general, then, southerly along the peaks of the Cabinet mountains down to the Lo Lo, which would come down to this territory somewhere west of the Flathead Agency, and on further south, and this follows then the Lo Lo Forest mountain peaks here back to an area that is west of Arlee, and then southerly for a certain distance down approximately to Evaro, and then east again, continuing along the Lo Lo range of mountains designated as the Missoula range of the Missoula Forest, back to the area in here that is east of the Joeko lakes, and then north and connects up with your point of beginning, containing about a million and a quarter acres of land, in general. The Flathead Project, in particular, consists of three quite definitely sepa-

(Testimony of Guy L. Sperry.)

rated areas. One is the Jocko, consisting of around 13,000 acres of irrigable land in the vicinity of Arlee, that is, south of the hills between the Dry Creek and the Jocko River, and containing also a small area in the neighborhood of Dixon, of a few hundred acres.

Q. This area has a distinct and separate source of supply from the main Mission Valley system water supply? [184]

A. Has a separate and distinct source of supply from the main Mission Valley system of water supply; we mention it only to show that it is a separate and distinct one and when we refer to the Mission Valley we are not referring to this Jocko area. The only connection that the Jocko has with the Mission Valley is that surplus waters from the Jocko River are carried by what we call the Tabor Feed Canal from the middle fork of the Jocko to Tabor Reservoir and there stored; we even bring water from a point east of Jocko lakes about—the Jocko lakes are about five miles up from the point of diversion on the middle fork of the Jocko, and then these lakes extend about five miles east of that point and even beyond that point we have a canal which takes water out of Placid Creek bringing it across the divide and emptying into the Upper Jocko Lake and from where it flows into the Lower Jocko Lake and on down the Jocko River and then is diverted at the Tabor Feed Canal, as stated before, and into the Tabor Reservoir.

(Testimony of Guy L. Sperry.)

Q. Now do you use any of that water?

A. This water is used only—it is only the flood or excess waters from the Jocko River that are used in the Mission Valley.

Q. In other words your normal flow of water is taken from Jocko Lakes and then used on the Flat-head Division and not the Mission Valley Division?

A. Yes. I might explain it. In the spring of the year when these streams are during flood stage, all of the waters there is only a portion of the water that is needed in the Jocko Valley because they are not irrigating, in fact they are not irrigating there at the present time [185] except a very little—we are diverting the flood waters from these ditches into the Mission Valley.

Q. Now can you show in detail where the flood water is carried, or can be carried, at the point of distribution on the main project?

A. Well the flood waters from the middle fork of the Jocko, which has its source of supply in the Jocko Lakes, we divert in the Tabor Feed Canal and into the Tabor Reservoir, from where it drops down the Dry Creek lining, we call it, which is a concrete lined canal which was originally a creek, and then is diverted in this Pablo Feed Canal; in other words it comes down the lining and may be diverted north into the Pablo Feed Canal which is indicated upon this map by this line which is the junction between the green and white portions of this map, and this water may be diverted north as

(Testimony of Guy L. Sperry.)

far as Post Creek, run down Post Creek and diverted into Kicking Horse Reservoir. it may be carried on into Ninepipe Reservoir, if it is considered—if it is found desirable to store this water in these two reservoirs it might be stored there; it might be dropped down the Crow Creek here and stored in Lower Crow Creek Reservoir, if it is desirable; it can be continued on up into the Pablo Feed Canal and carried over and stored in the Pablo Reservoir; so that it is a very flexible system, so far as supplying waters from the Jocko Valley or from any of the streams along the Mission Range along whose base this Pablo Feed Canal runs.

Q. Now will you recite the other sources of supply of water supply, naming the streams, for the Mission Valley Division, and describe the uses made of them? [186]

A. The sources of supply for the Mission Valley Division are as indicated before, the Jocko water, flood water; the Dry Creek, which runs into the Tabor Reservoir, in addition to the waters that come in from the Jocko, the storage, and Mission Reservoir storage, and McDonald Reservoir—that is, the McDonald Reservoir is used in Post Creek—so we have the Dry Creek, Mission Creek, Post Creek, Marsh Creek, south, middle and south Crow Creek, and the branches of Mud Creek, Lost Creek, going north, and the canal that swings along west on the south side of the hill—this is what is ordinarily

(Testimony of Guy L. Sperry.)

designated the Polson Hill; this ridge is between the Pablo Reservoir and Polson and is designated as Polson Hill; it now swings along on south of that hill and continues in a westerly direction and then a southerly direction into the Pablo Reservoir. In addition to these streams there is a small amount of water that may be diverted from Big Creek up east of Polson, and Hell Roaring Creek which is farther north, by means of canal that we have here carrying the water from Hell Roaring to Big Creek, after the water goes through a power plant which belongs to the government, in this vicinity; after passing through the power plant it is diverted in a feed canal and is stored in twin reservoirs; one is available for use in this area, that is, in north of Polson here and east of Polson here. We have one more area which I simply describe . . .

Q. . . . Before you get to that, do you utilize any of the waters of Flathead River?

A. We utilize the waters of Flathead—we have two additional sources of supply, that is, we have water going from—any surplus water that may be—that may come into the creek— [187] into Crow Creek or Post Creek or Mud Creek below the Pablo Feeder Canal—any surplus water runs into Crow Reservoir, which is quite a bit lower in elevation than some of the other reservoirs indicated on the map. There are at times surplus waters by virtue of return flow from this large area in irrigation, there is more or less water collecting in the low spots and draws that

(Testimony of Guy L. Sperry.)

gets away from the irrigator, and by return flow goes into the various creeks adjacent to where the lands are being irrigated; these waters are collected and conserved in lower Crow Reservoir. In addition to its main purpose to turn water down from the Pablo Feeder Canal, there is also quite a water flow into Lower Crow Reservoir, and at times there is an excess of water in Crow Reservoir over the requirements of the Moise Valley, from which water runs down Crow Creek and is diverted in this Moise Canal; at times there is a surplus of water here and when this reservoir becomes full, this Crow Reservoir, we have a small pumping plant, indicated just west of the railroad, northwest of Ninepipe Reservoir, from which we pump; we have a 25 second foot pump, which would be 2000 miner's inches, which pumps water about 42 feet in elevation from which point it runs by gravity into Ninepipe Reservoir; we run this pump only when there is surplus water, more than will be needed for the Moise Valley; in other words we reclaim from eight to ten thousand acre feet of water each year by the Crow Creek pumping plant. I might call attention to the fact that before this canal from Tabor Reservoir down Dry Creek—before this creek was lined, we lost approximately 80 percent of that water before getting it down where it could be used; there are five or [188] six miles of this creek which is now lined with concrete lining and we can serve many thousand acre feet of waters that are made avail-

(Testimony of Guy L. Sperry.)

able and does not sink in the ground and get away from us, so we can use it down here where we cross the Pablo Feed Canal. In addition to the Crow Creek pumping plant we have just completed a pumping plant about four miles down the Flathead River from Polson; this is a 200 second foot plant, consisting of three pumps which lift the water about 335 feet in elevation through a 3—4 foot diameter pipe lines which are 630 feet long, and it is then carried from the end of the pipe lines through a concrete lined canal for about two miles and a quarter and by an earth canal from there for about another half mile into the Pablo Reservoir. This pumping plant has just been completed and will be in shape to deliver water—it is in shape to deliver water at the present time—in fact, we have already pumped 10 or 12 thousand acre feet of water into this Pablo Reservoir last fall and this spring. This pumping plant was made possible by the Kerr Dam, which is about three or four miles further down the river from the pumping plant, where the Montana Power Company has developed 77 thousand horse power by putting in a hydro-electric plant, and the project has an arrangement with the Power Company whereby they have secured a 15,000—that is, a block of 15,000 horse power for pumping and resale . . .

Q. . . . Now, referring in particular to the waters of Post Creek, will you explain how they are used

(Testimony of Guy L. Sperry.)

from their source; what control is exercised over them, by the government?

A. Well the waters of Post Creek are stored ordinarily in McDonald Reservoir; this McDonald Lake Reservoir was origi- [189] nally a natural lake, and an additional dam was placed across this by the government along about 1917; this lake has a capacity of somewhere between seven and eight thousand acre feet; the ordinary procedure is that water is allowed to collect in the lake until along in the spring some time, from Post Creek, which runs ordinarily somewhere around 40 thousand acre feet of water or 45 thousand acre feet of water a year; when the lake becomes full ordinarily the water is run from McDonald Lake down Post Creek to—or down Post Creek to the Pablo Feed Canal, and then is carried north to the point where the water is stored in the Pablo Reservoir. When your surplus of water is less—I might go back a little ways and say that this Pablo Feed Canal runs from south to north, as indicated by Mr. Stockton, for the reason that the larger supply of water in general is in the south end of the project; all these streams practically—Post Creek being the largest one of our streams—lie in the southern part of the valley, and for that reason this canal can be run from the point of the largest supply to the point of the lesser supply and provide an option on the location in which these waters can be used; if it were run from the lesser supply to the larger supply of

(Testimony of Guy L. Sperry.)

course you wouldn't be able to get your water in the location at which it is needed, that is, the point where there is less water supply, but the way the system is laid out that is possible, and the reason for the pumping plant of course is that this large capacity pumping plant is used because of the fact that there is not sufficient gravity water to water the irrigable lands without an additional supply by pumping. [190]

Q. What is the capacity of your storage reservoirs?

A. The total capacity of the storage reservoirs in the Mission Valley is just a little less than 100 thousand acre feet—about ninety-eight thousand acre feet.

Q. On an average how many acre feet do you impound annually?

A. We impound annually all the water that we can get from the various streams; the maximum storage ordinarily occurs about the first of July; in other words, early in the spring the flow is quite small; we impound all the water we can, that is, from the early flow; as the season advances in May we get considerable storage, and in June of course we get the large runoff, and ordinarily about July first we have our maximum storage in these various reservoirs, running up as high as 85 thousand acre feet last July first. I believe we had about 85 thousand acre feet in storage.

Q. Will you define this term we have used, that

(Testimony of Guy L. Sperry.)

is being used and that will be used constantly in this case—the “ultimate irrigable acreage” of your project?

A. The ultimate irrigable acreage of the project means the total eventual acreage that can be watered on the project by the project system; in other words it consists of all of the lands, or practically all of the lands, that are really susceptible of irrigation under the system, that we will have. The Pablo Feed Canal quite definitely fixes the elevation on the east side of the project; we do not expect to go above the Pablo Feed Canal except possibly in some exceptional cases.

Q. What is the ultimate irrigable acreage of the Flathead Project as it now consists?

A. About 138 thousand acres, including the Jocko Valley [191] and the Camas Division, which is about 25 miles west of the Pablo Reservoir and is not shown on this map and is not pertinent to the case in so far as its source of supply is defined.

Q. What is the ultimate irrigable acreage of the Mission Valley Division, designated in green on the map, Plaintiff's Exhibit 1?

A. About 112 thousand acres of the project lands and somewhere between five and six thousand acres of private—that is, the Secretarial rights or the rights that have been granted by the Secretary of the Interior.

Q. How many acres of your Mission Valley Di-

(Testimony of Guy L. Sperry.)

vision do you know were irrigated during 1935, actually irrigated under the government projects?

A. About 62 thousand acres—in 1935 I think, something less than that—I don't remember the exact acreage in 1935—I think it was 40 some thousand acres in 1935.

Q. Do you have any record here which would show how many acres were irrigated in 1935 by the government project system on the Mission Valley Division? A. Possibly I have.

Q. Would you refer to those records and refresh your memory?

A. The irrigated acreage September 1, 1935 was 54,364 acres.

Q. In the Mission Valley?

A. In the Mission Valley; that is the irrigated acreage, and the irrigable acreage, which took in all of the irrigable land, of the lands that were actually watered, was 65,073 acres. [192]

Q. Now that acreage, did that acreage include any acreage covered by these so-called Secretarial private water rights?

A. No, that was outside of the—in addition to the private Secretarial rights.

Q. Can you approximate the acreage covered by the Secretarial private water rights not under the Flathead Project in the Mission Valley Division?

A. Somewhere between five and six thousand acres.

(Testimony of Guy L. Sperry.)

Q. I show you plaintiff's offered exhibit 3 and will ask you to identify it?

A. This is a copy of the project—certified copy of the project map water rights, beneficial use, prepared by the engineers of the project, showing the location of the lands in this case, that is, the lands that are in litigation; showing the canals, private canals, and it is a copy of the—certified copy of the original map from which the larger map on this board has just now been made. I might say that this map is an enlarged copy of this map here, for the purpose of better illustrating and showing in detail the private ditches of the defendants and the only way in which the map differs are the working over some of the canals so as to make them stand out and show so that they will show what we are talking about, and that the lands indicated in the pink color are the lands for which private water rights were granted in the Secretarial decree or in the Secretarial adjudication, and that the lands in green represent the portion of the lands of the defendants which are under the Flathead Project system, under the government system. In other words there is a portion of most of the lands of the [193] defendants under the government system in addition to the lands for which they have private water rights.

Mr. Simmonds: We now offer the Plaintiff's Exhibit 3 in evidence as a certified photostat of an official map certified by . . .

(Testimony of Guy L. Sperry.)

The Court: Any objection?

Mr. Wallace: No objection.

Mr. Smith: No objection.

The Court: Admitted without objection.

PLAINTIFF'S EXHIBIT 3,

being the document so identified, was thereupon received in evidence without objection and is on file with the original exhibits in this case.

N



Former Allotment
No. 784
Ora Deschamps
Now owned by
Bert Lish.

SEC. 17, T. 19N. R. 19W. M.P.M.



Irrigated 4.8 Acres

June Creek

Brush
and
Swamp.

Irrigated 35.3 Acres

June Creek
MISSION LATERAL "B"

S $\frac{1}{4}$ Cor. Sec. 17

DEPARTMENT OF THE INTERIOR
U.S. INDIAN IRRIGATION SERVICE
FLATHEAD PROJECT MON.
WATER RIGHTS - BENEFICIAL USE
LANDS OF BERT LISH
FORMER ALLOTMENT No. 784
W $\frac{1}{2}$ SE $\frac{1}{4}$ SEC. 17, T. 19N. R. 19W.

F-4582

St. Ignace, Mont.
August 11, 1926.



MISCELLANEOUS IRRIGATION DATA FOR FISCAL YEAR 1935.

Sheet 3 of 4

Projects by State	Number of Indian Families Farming	Est'd. Total of Irrigable Land	Area under Constructed Canals	Acreage Irrigated by Indians	Acreage Irri- gated Ind. Land Leased	Acreage Irri- gated White Owned Land	Total Irrigated Year 1934	Acreage Under Constructed Canals not Irrigated	O & M Costs Fiscal Year 1935	Est'd Con- struction Expenditures Fiscal Year 1936	Tentative Estimates Additional Required to Complete	Estimated Cost Per Acre When Completed	Average value of Land Per Acre When Irrigated
COLORADO													
Pine River Project	80	15,522	5,700	3,856	341	1,431	5,628	72	13,890.20		3,510,000.00	78.00	125.00
Total.....	80	15,522	5,700	3,856	341	1,431	5,628	72	13,890.20		3,510,000.00	78.00	125.00
IDAHO													
Fort Hall	211	90,000	60,000	8,065	7,515	15,590	31,170	28,830	54,736.03	150,000.00	2,350,000.00	49.00	125.00
Fort Hall (Mise).....	115	10,000	5,000	3,382	300	80	3,762	1,238			250,000.00	25.00	100.00
Fort Lapwai Reservation.....	20	800	300	300			300						
Total.....	346	100,800	65,300	11,747	7,815	15,670	35,232	30,068	54,736.03	150,000.00	2,600,000.00		
MONTANA													
Blackfeet	11	80,500	21,565	O&M project discontinued Sept. 30, 1933				21,565			1,524,048.00	33.68	60.00
Crow	76	63,360	53,032	1,722	10,749	6,865	20,336	32,696	46,301.70		609,927.00	41.40	50.00
Fort Belknap	153	25,875	18,768	13,490	1,332	103	14,925	3,843	19,496.32		340,000.00	27.00	30.00 to 50.00
Flathead	68	136,541	101,417	1,873	3,762	54,580	60,215	41,202	104,885.84		2,540,000.00	52.00	70.00 to 95.00
Fort Peck	46	36,000	22,794	902	537	906	2,345	20,449	15,757.32		500,000.00		30.00 to 50.00
Total.....	354	342,276	217,576	18,987	16,380	62,454	97,821	119,755	186,441.18		5,513,975.00		
NEVADA													
Carson Sinks Allotments.....	60	4,877	4,877	1,600			1,600	3,277	5,418.71		32,500.00	52.00	125.00
Fort McDermitt	56	805	600	600			600				30,000.00	60.00	100.00
Hoopa	25	625	355	320			320	35			50,000.00	98.00	125.00
Pyramid Lake	60	3,130	2,200	862			862	1,338	2,282.12	50,000.00	20,000.00	20.00	150.00
Ruby Valley	5	40	10	5			5	5			3,000.00	75.00	125.00
Summit Lake	15	400	300	280			280	20			27,500.00	69.00	125.00
Walker River	64	7,088	3,512	1,780	40		1,820	1,692	6,772.63		15,000.00	82.00	100.00
Western Shoshone (Duck Valley).....	129	15,000	5,780	5,600			5,600	180		320,000.00	330,000.00	50.00	125.00
Total.....	414	31,965	17,634	11,047	40		11,087	6,547	14,473.46	370,000.00	508,000.00		

Projects by State	Number of Indian Families Farming	Est'd. Total of Irrigable Land	Area under Constructed Canals	Acreage Irrigated by Indians	Acreage Irrig- ated Ind. Land Leased	Acreage Irrig- ated White Owned Land	Total Irrigated Year 1934	Acreage Under Constructed Canals not Irrigated	O & M Costs Fiscal Year 1935	Est'd Con- struction Expenditures Fiscal Year 1936	Testative Estimates Additional Required to Complete	Estimated Cost Per Acre When Completed	Average value of Land Per Acre When Irrigated
NEW MEXICO													
Acoma	271	1,300	1,300	954			954	346		3,000.00	27,000.00	58.00	75.00
Capt. Tom Wash	41	2,500	1,500	280			280	1,220	500.00	25,000.00	50,000.00	56.00	75.00
Asamera	(1)	200	200					200			5,000.00	62.00	75.00
Mrs. H. Burke School		60	60			*60	60					200.00	125.00
Choiska	35	750	350	302			302	48			12,000.00	28.00	75.00
Cochita	65	1,824	821	468			468	353		3,000.00	72,000.00	62.50	125.00
Crystal	20	450	200	158			158	42	1,038.47		20,000.00	91.00	75.00
Logback	218	5,425	3,100	2,814		*265	3,079	21	10,551.94	25,000.00	179,000.00	145.00	125.00
Mleta	328	6,874	3,439	2,436			2,436	1,003			190,000.00	31.50	125.00
Mez	125	1,560	1,000	1,000			1,000	560	300.00		15,000.00	33.00	75.00
Micarilla Agency Project	100	485	440	282		158	440				13,000.00	44.00	100.00
Mans Lake	(1)	400	400					400			12,000.00	50.00	75.00
Mirkland (Fruitland)		5,100								40,000.00	302,000.00	162.00 (not complete)	125.00
Moguna	525	3,020	3,020	1,578			1,578	1,442	2,423.65	8,000.00	52,000.00	80.00	75.00
Mariano Lake	(1)	300	300					300			12,000.00	69.00	75.00
Mescalero Agency Project	41	685	150	150			150		64.73		60,000.00	110.00	75.00
Middle Rio Grande Conservancy									351.94	5,000.00	60,000.00	130.00	75.00
Mambe	32	697	697	190			190	507			10,000.00	55.50	75.00
Masehiti	(1)	300	300					300			5,000.00	82.50	75.00
Meuris	29	160	155	133			133	22		2,000.00	30,000.00	92.00	75.00
Mead Lake	24	700	700	143			143	557		3,000.00	175,000.00	48.00	125.00
Mandia	34	3,739	736	623			623	113			155,000.00	43.00	125.00
Man Felipe	120	3,797	1,451	1,030			1,030	421		5,000.00	13,000.00	189.50	75.00
Man Hdefonso	31	326	326	138			138	188			9,000.00	23.50	75.00
Man Juan	140	867	867	647			647	220		2,500.00	30,000.00	31.60	125.00
Manostee	65	800	784	176			176	608			45,500.00	157.50	75.00
Manana Ana (Ranchitos)	56	1,180	625	582			582	43		5,000.00	182,000.00	51.00	125.00
Manana Clara	100	650	650	212			212	438		1,500.00	17,000.00	165.00	75.00
Manana Domingo	175	4,030	1,752	1,177			1,177	575		8,000.00	34.00	75.00	75.00
Manaos	186	6,800	3,800	2,123			2,123	1,677	527.92	15,000.00	17,000.00	62.50	50.00
Mesque	30	320	225	221			221	4			4,000.00	54.00	75.00
Moadlena	(1)	100	100					100			7,500.00	62.50	50.00
Moeito (Totse Wash)		250	250					250					
Water Supply, Misc. Pueblos									8,284.98	3,800.00	539,300.00	49.00	75.00
Mojia	32	1,000	758	229			229	529		19,000.00			75.00
Milbetod	10		21	21			21						
Muni Agency Project	512									20,000.00	40,000.00	106.00	125.00
Muni		5,000	5,000	904	114		1,018	3,982					75.00
Muni Nutria		1,375	638	199			199	439					75.00
Muni Ojo Caliente		300	285	163			163	122					75.00
Muni Pescado		1,485	486	288			288	258					75.00
Total	3,345	64,807	37,446	19,561	114	483	20,158	17,288	24,043.63	193,800.00	2,499,700.00		

STATEMENT OF IRRIGATION COSTS, FISCAL YEAR 1935, AND TOTALS TO JUNE 30, 1935, INDIAN IRRIGATION PROJECTS.

Sheet 4 of 6

	Costs for the Fiscal Year 1935				TOTAL COSTS TO JUNE 30, 1935.							Cancellations Act July 1, 1932	Costs plus Inventories minus Repay- ments and Cancellations
	Preliminary Surveys and Construction	Operation and Maintenance	Adminis- tration	Totals for the Year	Preliminary Surveys and Construction	Operation and Maintenance	Adminis- tration	Value Inventories	Construction Repayments	Operation and Maintenance Repayments			
IDAHO													
Bannock Creek-Fort Hall small projects	1,870.08		32.52	1,902.60	15,528.82	1,243.96	42.99	977.63				1,254.43	16,538.97
Coeur d'Alene					247.05							247.05	
Fort Hall		54,736.03	951.70	55,687.73	1,894,874.01	1,315,720.88	30,664.14	45,630.95	169,128.85	514,417.67			2,003,543.46
Fort Lapwai Reservation					3,361.63	310.60	47.93				2,509.95		1,210.21
Kootenai Allotments					100,979.49		605.76						101,585.25
Lehi					2,366.13							2,366.13	
Total	1,870.08	54,736.03	984.22	57,590.33	2,017,357.13	1,317,275.44	31,360.82	46,608.58	169,128.85	514,417.67	6,377.56	2,722,677.89	
MINNESOTA													
Bannock Creek Drainage					50.32		.45					50.77	
White Rice Lake					230.29							230.29	
Total					280.61		.45					281.06	
MONTANA													
Blackfeet					1,210,617.62	487,305.87	6,212.78	34,116.81	29,703.74	104,242.51			1,604,306.83
Brow		46,301.70	805.06	47,106.76	1,987,843.94	1,440,112.01	23,091.31	12,678.51	16,364.73	488,659.32			2,958,701.72
Flathead	283,231.62	104,885.84	6,748.27	394,865.73	7,175,559.94	1,492,211.05	62,629.25	68,992.88	91,386.37	987,708.69	149,853.85		7,570,444.21
Fort Belknap	1,205.80	19,496.32	359.95	21,062.07	366,001.71	371,210.14	5,831.08	6,821.39	40.10	11,815.24		231,476.54	506,532.44
Fort Peck		15,757.32	273.97	16,031.29	860,685.06	226,686.30	2,698.46	2,076.39	17,918.44	29,258.45	430,278.60		614,690.72
Tongue River	13,836.14		240.57	14,076.71	173,396.78	29,410.92	1,141.14	157.75			162,328.42		41,778.17
Total	298,273.56	186,441.18	8,427.82	493,142.56	11,774,105.05	4,046,936.29	101,604.02	124,843.73	155,413.38	1,621,684.21	973,937.41	13,296,454.09	
NEBRASKA													
Kickapoo Drainage					421.51		.57					37.33	384.75
Total					421.51		.57					37.33	384.75
NEVADA													
Arrowhead Trail					60.54							60.54	
Ash Meadows					137.98		1.29					139.27	
Carson School					12,143.59	1.34	145.41				12,290.34		
Carson Sink Allotments	5,381.00	5,418.71	187.78	10,987.49	219,670.05	141,058.65	2,164.51						362,893.21
Fort McDermitt					6,278.95	1,735.54	92.52				8,107.01		
Moapa					11,128.04	5,795.10	208.69				17,131.83		
Pyramid Lake		2,282.12	39.68	2,321.80	131,384.45	68,515.20	1,760.54	276.35			199,614.74	2,321.80	
Ruby Valley					761.25		5.85				767.10		
Summit Lake					259.44		2.70				262.14		
Walker River	81,654.34	6,772.63	1,537.50	89,964.47	281,615.43	116,710.56	5,310.68	18,366.00		232.90	261,117.23	160,652.54	
Western Shoshone	9,666.64		168.07	9,834.71	89,063.15	48,815.00	2,008.70	15,449.54			112,578.99	42,697.40	
Total	96,701.98	14,473.46	1,933.03	113,108.47	752,442.87	382,631.39	11,700.89	34,091.89		232.90	612,069.19	568,564.95	

(Testimony of Guy L. Sperry.)

Q. Referring to the storage waters of the Flat-head Project, can you estimate what percentage of the waters are storage, which are used each year to irrigate the lands under the project system?

A. I can estimate the percentage without definite proof; it is not—that is not a figure that can be definitely stated and substantiated except as a matter of experience and knowledge. I will say that the best record that we have of the stored water is to take the amount of stored water on July first of each year; that is the date each year on which we find that our storage is at a maximum. We have at all times running water in from the various streams into the reservoirs of the project, and the inflow is a variable amount, and we are storing water at the same time that we are using water, drawing water out of the reservoirs for irrigation, and at times the in-go is in excess of the out-go, and along late in the season . . . [194]

The Court: Well, the question is can you do a certain thing; can you estimate the amount of water that is used in irrigation, from storage, during the runoff?

Mr. Simmons: Yes, can you estimate that amount?

The Witness: My estimate is about 38 percent of the water is stored water.

Q. Now, during the year 1935, during the irrigation season of 1935, without your storage water was there sufficient normal flow of water available

(Testimony of Guy L. Sperry.)

to adequately irrigate the lands irrigated under the Flathead Project system? A. No sir.

Q. Even with your storage water during 1935 was there sufficient water available to adequately irrigate the lands actually farmed and irrigated under your Flathead Project system?

A. No sir, there was not.

Q. Mr. Sperry, what do you mean by the duty of water?

A. Well, by the duty of water we would mean the amount of water that is required to irrigate an acre of land.

Q. And what would you say to be the average duty of water on lands under your Flathead Irrigation Project system—that is, in the project as a whole, between what figures would your duty run?

A. I would say to adequately irrigate the land it would run between a foot and three-quarters and three feet, possibly three and a half feet.

Q. Are you familiar with the lands of the defendants which are involved in this case?

Whereupon, at 3:27 o'clock p. m., recess was had for 15 minutes, at the expiration of which time the trial was [195] resumed, and the last preceding question was, by the reporter, read to the witness.

A. Yes, in a general way.

Q. What would you say as to the average duty of water on the lands of the defendants?

(Testimony of Guy L. Sperry.)

A. I think there is a difference in the duty of water, that is, of the nature of the lands under the two ditches; I would say that the lands under the McDonald-Deschamps ditch, which lies east of the Magee-Minesinger lands, are in general a little more open soil than the lower lands; in other words the lands that are higher along on the mountain range, in general are a little more open than the lands further down, they are a little more gravelly soil; the lands under the Magee-Minesinger ditch, I think, are fairly tight lands; under the McDonald-Deschamps they will require a little more water. I would say that possibly the Magee-Minesinger lands under this ditch, that a foot and three-quarters would be sufficient for very good crops; that the upper lands, the McDonald-Deschamps ditch, possibly might require two feet or some of them two and a half feet.

Q. When you say a foot of water you mean an acre foot of water?

A. An acre foot of water, yes.

Q. What do you mean by an acre foot of water?

A. It means sufficient water to cover an acre one foot deep.

Q. Mr. Sperry, referring to plaintiff's offered exhibit 4, I will ask you to designate by pointing out the colors of the lands of the defendants in this action, which are irrigable under the Flathead Irrigation Project system, and those which are cov-

(Testimony of Guy L. Sperry.)

ered by the so-called Secretarial private water [196] rights?

A. I believe that I indicated before that the lands of the defendants which have a so-called Secretarial right are those colored in pink; they are irregular shaped tracts, and the various lands of the defendants there are colored to make them stand out and for illustrating purposes they are colored pink. The lands colored green are the others or the remaining irrigable lands which are under the Flat-head Project.

Q. And subject, I take it, to water diversion from the Project system?

A. And subject to water diversion from the project system, and subject to operation and maintenance charges and construction charges the same as any other lands on the project.

Q. Now I am handing you plaintiff's offered exhibit number 5, and I will ask you to identify it?

A. This is a certified copy of reports submitted to the Congress of the United States on December 23, 1935.

Q. Does that report show the moneys the United States has expended for construction on the Flat-head Irrigation Project up to June 30, 1935?

A. Yes sir, it shows the total amount of costs to June 30, 1935, in two columns; one is Preliminary Surveys and Construction, which amounts to \$7,175,-559.94; and Administration, in another column, it

(Testimony of Guy L. Sperry.)
shows Administration Costs are \$62,629.25; these two columns together represent the total.

Q. And what is the total you get after adding those two columns together?

A. \$7,238,189.19.

Mr. Simmons: I ask leave, at this time, of recalling Mr. Sperry to prove certain other things in order. [197]

Cross Examination

By Mr. Smith:

Q. With reference to Plaintiff's Exhibit 1, as I understand, the Jocko Division of the Flathead Irrigation Project is shown in yellow?

A. That's right.

Q. And the Camas Division is not indicated on that map, is that correct?

A. The Camas Division is not indicated on the map for the reason that it is about 25 miles, the area served is fully 25 miles west of Polson, across the Flathead River, and could not be shown on this map, and is not pertinent to the case inasmuch as it has an entirely different source of water supply.

The Court: A motion to strike the last part—"not pertinent to the case because it has a different source of water supply"—would it be possible to intermingle the waters which are used on the Mission Valley Division and those which are used on the Camas Division?

The Witness: No.

Q. With respect to the Jocko Division is it pos-

(Testimony of Guy L. Sperry.)

sible to use any of the waters of the Jocko Division except the flood waters, as you have indicated, on the Mission Valley Division?

A. Well it is possible to use them but it is not the policy of the service to use them because they are natural waters that are tributary to this Jocko Valley, and up until these waters are now needed in the Jocko Valley they are diverted into the Mission Valley, but after the flood runoff is gone and there is not an excess of water for the Jocko Valley the policy of the department is to use these waters in the Jocko [198] Valley.

Q. Could the Mission be used on the Jocko Division?

A. No, I would say it would be extremely difficult, if possible, to use any of the waters from the Mission Valley on the Jocko, for the reason that the storages in general are lower; I wouldn't say it would be practical impossibility to use them, but extremely difficult and not practicable.

Q. Now then is the Mission Valley Division then a more or less self contained unit, in so far as the lands and the water supply for those lands are concerned?

A. Yes I would say that it is.

Q. You have indicated that the Pablo Feeder Canal runs from the south to the north?

A. Yes.

Q. And also that the greater source of supply of water on the reservation rises on the south end?

(Testimony of Guy L. Sperry.)

A. Yes sir.

Q. Of the reservation. That being true, if a great amount of water is taken out of Post Creek would that have a definite effect on the amount of water which could be used by some person owning land in the vicinity of Ronan, Montana?

A. Any water that is taken out of Post Creek above the Pablo Feed Canal, that is, any water that is diverted past the Pablo Feed Canal on Post Creek, puts it in a position where it deprives the land north, of that amount of water.

Q. Yes; with particular respect to the diversion through the Magee-Minesinger Ditch and the McDonald-Deschamps Ditch, does the amount of water which is taken through those two ditches influence to some extent the amount of water which [199] is available for lands lying to the north of those ditches?

A. It undoubtedly does.

Q. The McDonald-Deschamps and the Magee-Minesinger ditches take out above the Pablo Feeder Canal?

A. That's right.

Q. And those waters cross the Pablo Feeder Canal before they get to those defendants' lands?

A. Yes.

Q. I notice on the map a square marked in red, marked "Dennis A. Dellwo" or "D. A. Dellwo;" is that the land owned by the intervener D. A. Dellwo?

A. Yes.

Q. The map does not show, does it, in any color

(Testimony of Guy L. Sperry.)

designation, the area of the Flathead Irrigation District?

A. No. It shows the area, not by color; the boundary between the Flathead and the Mission irrigation districts is Post Creek; that is the separating line between the two irrigation districts.

Q. And is all of the land colored in green, north of the Post Creek lands, within the boundaries of the Flathead Irrigation District?

A. Yes it is.

Q. And the land to the south is in the Mission Irrigation District?

A. The land to the south is in the Mission Irrigation District, south and east.

Q. And in the operation of the project, insofar as the sources of supply are concerned and insofar as the deliveries of water to the lands are concerned, does the division of the project into these irrigation districts have any effect? [200]

A. Well it has an effect administratively, although all of the waters of the Mission Valley are handled as one source of supply and delivered to the lands without charge to the division, between the two irrigation districts.

Q. When you say administratively do you mean that in the sense of assessment of operation and maintenance costs and that sort of thing?

A. That's right.

Q. And not with respect to the actual use of the waters upon the lands in these two divisions?

(Testimony of Guy L. Sperry.)

A. That's right, there is no distinction in charge between the districts, in that respect.

Q. I believe you said that the average duty of water on the Mission Valley Division was from one and three-quarters and three and a half acre feet; do you mean that that is the average duty or that those are the minimum and maximum?

A. Those are the minimum and maximum. I would like to qualify the minimum and maximum, please; to state that there is a minimum and maximum would not be to state it correctly; there are some lands on the Flathead that raise very good crops with a foot and a half of water; there are possibly some lands on the project that might to advantage, small acreages, use in excess of, we will say three or three and a half feet, notably in the Moise Valley; that is the area that I would say is where most water would be required; and when I speak of a foot and three-quarters I mean for—or three to three and a half—I mean for good crops; that is what we might say would be an abundance of water, perhaps, not enough to waste, but sufficient water to raise good crops.

Q. Now then the one and three-quarter feet, that represents [201] properly a minimum, except for some few particular and rather exceptional tracts of land, is that it?

A. Well there is possibly a considerable acreage on the Post Division that——

(Testimony of Guy L. Sperry.)

The Court: No we can't deal with possibilities; we must deal with facts; we can't have a spread of one and a half to three and a half; you are dealing with the reasonable use of water on particular lands.

A. (continued) Well I would let it stand from one and three-quarters to three and a half.

Cross Examination

By Mr. Wallace:

Q. The ultimate irrigable area of the project was originally fixed at about 152 thousand acres, was it not?

A. Possibly; I would say that it has never been definitely fixed; it is impossible to fix the area definitely.

Q. And when you state there are between five and six thousand acres of lands irrigable with the so-called Secretarial water rights, you mean that is only the number of acres within the Mission Valley Division, or within the project?

A. Within the Mission Valley Division.

Q. Would you estimate the number of acres, other than irrigated by water recognized by the Secretary of the Interior, within the project?

A. About 84 thousand acres in the Mission Valley, in the classes of land that are accessible at the present time and irrigable.

Q. I'm afraid you didn't understand me. The number of acres of irrigable land without irrigation by water rights recognized by the Secretary of the

(Testimony of Guy L. Sperry.)

Interior within the pro- [202] ject, the whole project?

A. Approximately eight thousand acres.

Q. Now then I will ask you to approximate the irrigable area of the allotments, Indian allotments, within the project?

A. Those that were originally Indian allotments?

Q. Yes those that were originally Indian allotments? A. About 62 thousand acres.

Q. And does that figure of 62 thousand acres include the eight thousand acres that had the Secretarial recognized water rights or is that in addition?

A. I think that is in addition to the between five and six thousand acres in the Mission Valley.

Q. So that would be close to 70 thousand acres, then, of irrigable area of Indian allotments?

A. Yes.

Q. Have you any way of telling whether or not, with the amount of normal flow of water and the amount of storage water which you are now storing and which you contemplate storing when the project is completed, will be sufficient water to properly irrigate the whole irrigable area of the project as now constituted at 138 thousand acres, or will there be a shortage?

A. It is possible there may be shortages in the dry years. We have just completed our pumping plant and it is a little bit early, we haven't gone through a season, so it is a little bit early for us

(Testimony of Guy L. Sperry.)

to state just what effect this will have, although it increases our supply wonderfully.

Q. But you rather anticipate that there will still be a shortage, do you not?

A. I don't anticipate there will be a definite shortage [203] for the lands that will be desirous of receiving water because all the lands that are irrigable will never be under irrigation at one time.

Q. Let me ask you, if you know, is there not a movement on hand now, and an examination and survey being made by the government, with the end in view of eliminating some of the lands from the ultimate irrigable acreage of the project, for the purpose of being able to deliver a sufficient amount of water to the remaining lands, in a proper manner?

Mr. Simmons: Objected to as incompetent and having no bearing.

The Court: Overruled.

A. A survey is being made by the authorities of the Department to see what lands—whether the lands should be excluded—whether a supply is not sufficient for the entire irrigable acreage; as to what the survey may indicate it is too early to say.

Q. Mr. Sperry, in so far as you know, there is sufficient water available, normal flow of water, on the reservation, to irrigate the irrigable area of all of the Indian allotments, is there not, to the full extent?

A. Natural flow?

Q. Yes.

(Testimony of Guy L. Sperry.)

A. No there is—all of the original Indian allotments?

Q. Yes.

A. I would say that there is a sufficient to raise good crops for all of the original Indian allotments, if you include storage—not with natural flow.

Q. Well you wouldn't want to include all of the storage that is now available, would you? [204]

A. Pretty close to it—not all of it, possibly, but quite a little of it, but not all of the storage, possibly.

Q. Well there is about 62 thousand or 72 thousand acres of irrigable Indian allotments acreage, isn't there?

A. Something like that.

Q. Do I understand you to mean that it will take all of the normal flow of water and all of the available stored water to properly irrigate those Indian allotments to the full extent?

A. To irrigate all to the full extent it would take a large part of the storage.

Q. Well then if you propose to take all of the normal flow of water and all of the stored water that is available, and spread it out over 138 thousand acres, there will be a very serious shortage of water for all times to come, will there not?

A. There will be always need to be very careful of the water because there will never be an excess; we have, however, our two pumping plants, the Crow Creek pumping plant and the Flathead River pumping plant and our pumping plant on the

(Testimony of Guy L. Sperry.)

Pablo Reservoir, under which there are approximately 30 thousand acres of land, and these plants very materially relieve the demand for water in the future.

Q. I understand that but I am asking you if there will not be a serious shortage of water if all of this irrigable—ultimate irrigable area, of 138 thousand acres is put under irrigation?

A. If it were all irrigated at one time I would say yes; the history of all irrigated projects is that there is little more than 75 or 80 percent of the irrigable land being [205] watered any one year.

Q. And that is due to what?

A. Various things; some of the land is out of production, they don't seed it to additional crops, they don't water it in that particular year; some of the land becomes seepage; this 138 thousand acres, you understand, includes all the lands that are not at the present time being irrigated and that will not, until cleared up by drainage, be irrigated; so there is a considerable area to reduce this 138 thousand acres; there will never be 138 thousand acres irrigated at any one time; there will never be a demand for it.

Q. But that is in contemplation now isn't it?

A. That is in contemplation; we will reclaim, it is true, a part of it, but no doubt there will be other parts that will be swampy, and it will include the swampy area, so that will probably be out.

(Testimony of Guy L. Sperry.)

Q. Well the amount of area that will become scrapped will be negligible?

A. Well I wouldn't say it would be too negligible; there will be a considerable area that will be swamp.

Q. Will you estimate that for us?

A. Well it is difficult to estimate; I would say a good many thousand acres.

Q. Mr. Sperry, I may not have understood your testimony about the defendants' lands on Exhibit 4; you say the pink areas are those irrigated by the so-called Secretarial waters?

A. That's right.

Q. And the green is the balance of the irrigable area?

A. That's right. [206]

Q. The white is not irrigable?

A. The white lands are, for some reason or other, not irrigable; of course there are other lands that are not marked on there that are white, we made no attempt to designate.

Q. The Duncan McDonald piece, 561, is owned by B. W. Alexander in this case, and is above the Pablo Feeder Canal?

A. That's right.

Q. And cannot be irrigated from the Pablo Feeder Canal or from the project in any manner?

A. Not without additional ditches, no; it would be possible to take out, of course, above the defendants' ditches, and water the land up there.

Q. But you wouldn't be very apt to do that for one piece of land?

A. No.

(Testimony of Guy L. Sperry.)

Redirect Examination

By Mr. Simmons:

Q. Mr. Sperry would it be physically possible to run the Post Creek water in a southerly direction to irrigate those lands designated in green on plaintiff's offered exhibit 1?

A. It would be possible to run the waters from Post Creek and starting at the same point the Pablo Feed Canal crosses Post Creek, and irrigate practically all the land, although naturally if the canal were run in the opposite direction it would dump it so as to leave a certain area between the new location and the present location; however, it would be possible to divert higher up Post Creek and still cover all the lands that are in the system.

Q. Now in any year since 1935 has there been sufficient [207] water to adequately irrigate the lands actually irrigated and farmed under the Flat-head Project system in the Mission Valley Division?

A. No.

Mr. Smith: May I ask leave to recall this witness as a witness on my case in chief?

The Court: You may. Mr. Sperry, you said it would be possible to divert that water, but you testified heretofore, didn't you, that it would not be practicable?

The Witness: Yes.

The Court: Then why deal with possibilities when it isn't going to be practicable?

(Testimony of Guy L. Sperry.)

Mr. Simmons: Well I didn't understand him.

The Court: My understanding was it could be done, but to no purpose; is that your understanding?

The Witness: That's correct.

Witness Excused.

W. S. HANNA

was called as a witness on behalf of the plaintiff and having been first duly sworn testified as follows:

Direct Examination

By Mr. Simmons:

Q. Your name is W. S. Hanna?

A. Yes sir.

Q. What position do you hold with the government?

A. District Engineer, United States Indian Irrigation Service.

Q. Does that give you supervision over the Flathead Irriga- [208] tion District? A. Yes.

Q. Since what year have you been connected with the—or have you been familiar with—the Flathead Irrigation District?

A. Well my first connection with the Flathead was in 1914; I was on a special commission that made a report on the Flathead at that time.

Q. And you went on the project and investigated the developments at that time?

(Testimony of W. S. Hanna.)

A. At that time yes.

Q. When did you have direct supervision of the Flathead irrigation? A. 1924.

Q. And how did that occur?

A. That was the time the handling of the Flathead work was turned over from the Reclamation Service to the Indian Irrigation Service.

Q. And you have had direct supervision of the project since 1924 to the present?

A. General supervision, yes.

Q. You are familiar with the sources of water supply on the project? A. Yes sir.

Q. Can you state approximately what percentage of the water is storage water, which is used for irrigation of the project lands in the Mission Valley Division?

A. Well I have made no special study of that; all I know is just what I heard, the project engineers estimate on it.

Q. It is considered, however, a storage project?

A. Yes. [209]

Q. Has there ever been a year, to your knowledge, when there has been an adequate water supply, from 1935 to the present, to adequately irrigate the lands actually irrigated in the Mission Valley Division, under the project system, including storage and normal flow of waters?

A. Well I doubt if there has been as much as they really require; it has run from an acre foot or a little less to one and a quarter or one and a half

(Testimony of W. S. Hanna.)

acre feet, minimum and maximum years.

Q. If more water had been available what would have been the result to the lands and the crops?

A. They would have used more water and probably raised a good deal more crops.

Q. Do you know of any lands that have been injured because of the shortage of water during 1935?

A. Not personally, but I have heard it mentioned on the project.

Q. Mr. Hanna I will hand you plaintiff's offered exhibit 6 and will ask you to identify it?

A. These are certified copies of notices of appropriation of water, that were made by the Reclamation Service in connection with the Mission Valley Division of the Flathead Project.

Q. Let me ask you this, in connection with the matter—did the Reclamation Service have charge or supervision of the Flathead Project at any time?

A. Yes.

Q. And do you know what years they had charge of the Flathead Project, its supervision and management?

A. From the organizing of the project, in 1907, to 1924. [210]

Q. And what is the date those filings were made?

A. Well here is one in 1913; I think some of them a little earlier than that.

Q. They were all prior to 1913 when the Reclamation had charge of the project?

(Testimony of W. S. Hanna.)

A. Well I can't say these were all made prior to that but it was along in there some time; some of them were made in 1910 or 1911, if I remember correctly, but they were made at the time the Reclamation was investigating and starting construction on the project.

Q. Do you know what the purpose of the Reclamation Service was, their officials, in making these filings?

A. Well it was my understanding it was simply notice to the public that that water was being appropriated for the Flathead private use.

Q. Did they attempt to acquire any rights thereunder? Do you know?

Mr. Wallace: Well it seems to me—we will object to that, as calling for a conclusion of the witness.

Mr. Simmons: I will withdraw it.

The Court: Very well.

Mr. Simmons: We now offer Plaintiff's Exhibit 6 in evidence.

Mr. Wallace: May it please the Court, the defendants recognize this is an equity case and there are equities in the case; we have no objection; in fact want the Court to have the benefit of all information possible in order to decide this case, but we do object to the introduction of this exhibit on the ground that it appears to be an attempt to appropriate water by the United States Government under [211] the state laws, state statutes of Mon-

(Testimony of W. S. Hanna.)

tana, and the Circuit Court has stated that the Montana statute is not applicable to acquiring a right to water.

Mr. Simmons: Of course it is not our contention at all that this establishes a water right; we plead under the complaint these notices of appropriation were filed merely as formal notice to all land owners on the reservation that the United States intends to make use of those waters. We are not relying on these appropriations in any way to establish any rights which may have accrued or vested in the Flathead treaty; it is simply a formal notice.

The Court: The objection will be overruled *pro forma*; the Court will determine finally whether or not the exhibits should be considered.

Mr. Smith: May the record show the intervener objects to the introduction of Plaintiff's Exhibit 6 in so far as the same constitutes an act on the part of the Bureau of Reclamation which is inconsistent with the ownership of water in the United States, on the ground that the commissioner of the Bureau of Reclamation had no power to do any act inconsistent with the right of the United States as holder of the legal title to the waters on the Flathead Reservation.

The Court: Well the same ruling. As I understand it counsel for the government says he does not intend to acquire any rights.

Mr. Simmons: No.

(Testimony of W. S. Hanna.)

The Court: And the offer is for the single purpose to show notice?

Mr. Simmons: That is the sole purpose. [212]

Plaintiff's Exhibit 6, the document referred to, was then received in evidence, and the same is on file with and forms a part of the original exhibits in this case.

PLAINTIFF'S EXHIBIT 6.

Approved by Director

Nov. 21, 1912

NOTICE OF APPROPRIATION OF WATER.

United States of America

State of Montana

County of Missoula—ss.

To All Whom These Presents May Concern: Be it known that the United States of America, pursuant to the provisions of the act of June 17, 1902 (32 Stat., 388), and under and by virtue of an act of the Legislative Assembly of the State of Montana, entitled: "An Act authorizing the Government of the United States to appropriate the water of the streams in the State of Montana, subject to certain restrictions", approved February 27, 1905, acting by and through H. N. Savage Supervising Engineer thereunto duly authorized by the Secretary of the Interior of the said United States in that behalf, does hereby publish and declare as a legal notice to all the world as follows, to-wit:

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

1. That the said United States has a legal right to the use, possession and control of, and claims 5,000 cubic feet per second of time of the waters of Post Creek.

2. That the purposes for which said water is claimed are for irrigating, domestic use and power purposes, and the place of intended use is to irrigate and use said water upon 60,000 acres of land, described as follows, to-wit:

17 to 22, 27 to 36-T. 20 N., R. 20 W.; 1 to 11, 13 to 16, 23 to 28, 31 to 36-T. 20 N.R. 21W.; 1 to 30,-T. 19 N., R. 20W.; 1, 2, 11 to 14, 23 to 25-T. 19 N., R. 21W.; 1 to 36-T. 21 N., R. 20W.; 1, 2, 11, 12-T. 20 N., R. 22W.; 23 to 26-T. 22 N., R. 21W.; 29 to 36-T. 22 N., R. 20W. also for domestice use in connection with the said land, and for developing power for pumping and other purposes at the point of diversion, and along the irrigating ditches and water conduits [470] to be constructed in connection therewith.

3. That the means of diversion, with size of flume, ditch, pipe or aqueduct by which it is intended to divert said waters is as follows:

A storage dam and controlling works for storing water and dropping same by natural channel, to canals taking out of streams at points below the dam.

which will carry and conduct.....cubic feet of

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

water per second of time from said Post Creek which said

will divert the water from said stream at a point upon its right bank, which bears N. 62° 00' W (mag) dist 856' from the southern M.C. to fractional M. C. marked M. C. on N side, Secs. 10 & 11, T. 19 N. R. 19 W.

and run thence

thence over and upon said lands.

4. That the said United States appropriated said water on the 31 day of March, A. D., 1913, and on that day caused a notice of appropriation to be posted in a conspicuous place at the point of diversion hereinbefore described, which said notice stated, among other things:

A. Number of cubic feet of water per second claimed as herein set forth;

B. The purpose for which the water was claimed and the place of intended use, as hereinbefore described;

C. The means of diversion, as herein set forth;

D. The date of appropriation, to-wit: The date on which the said notice was posted.

E. The name of the appropriator as herein set forth.

5. That the name of the appropriator of the said water is the United States of America. [471]

6. That the said United States also hereby claims said ditch and the right of way therefor and for

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

said water by it conveyed, or to be conveyed, from said point of diversion and appropriation to said lands or point of final discharge, and also the right of location upon any lands of any dams, flumes, and reservoirs constructed or to be constructed by the said United States in appropriating and using said water.

7. That the said United States also claims the right to keep in repair and to enlarge said means of water appropriation at any time and to change the point of diversion and the right to dispose of said right, water ditch or said appurtenances in part or whole, at any time.

Claiming the same all and singular under any and all laws, national and state, and in accordance with the rulings and decisions thereunder in the matter of water rights.

Together with all and singular the hereditaments and appurtenances thereunto belonging and appertaining, or to accrue to the same.

UNITED STATES OF AMERICA,

By: (sgd) H. N. SAVAGE,

Its agent in that behalf and thereunto duly authorized by the Secretary of the Interior of the said United States.

State of Montana

County of Missoula—ss.

E. W. Tappan, having been first duly sworn deposes and says that he is a citizen of the United

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

States and over the age of twenty-one years; that on the 31 day of March, A. D., 1913, in the course of his employment by the United States he posted the above notice at the place named therein at the point described as the point of diversion, and that the matters and facts contained in said notice are true.

(sgd) E. W. TAPPAN. [472]

Subscribed and sworn to before me this 1st day of April, 1913. My commission expires: Dec. 24, 1915.

(Seal) (sgd) M. A. O'CONNELL,
Notary Public in and for the State of Montana,
residing at St. Ignatius, Montana.

State of Montana

County of Cascade—ss.

H. N. Savage, having been first duly sworn, deposes and says that he is a citizen of the United States over the age of twenty-one years; that on March 31, 1913, he was and is now an employee of the United States, being Supervising Engineer in charge of the work of the United States in the State of Montana, under the act of June 17, 1902 (32 Stat., 388); that he knows the contents of the foregoing notice, and that the matters and facts contained therein are true.

That he caused said notice to be posted on behalf of the United States at the place named therein:

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

and that said notice was so posted as he verily believes.

(sgd) H. N. SAVAGE.

Subscribed and sworn to before me this 4th day of April, 1913.

My commission expires May 24th, 1913.

(Seal) (sgd) R. J. REYNOLDS,

Notary Public in and for the State of Montana, residing at Great Falls, Montana. [473]

Approved by Director
Nov. 21, 1912.

NOTICE OF APPROPRIATION OF WATER.

United States of America
State of Montana
County of Missoula—ss.

To All Whom These Presents May Concern: Be it known that the United States of America, pursuant to the provisions of the act of June 17, 1902 (32 Stat., 388), and under and by virtue of an act of the Legislative Assembly of the State of Montana, entitled: "An act authorizing the Government of the United States to appropriate the water of the streams in the State of Montana, subject to certain restrictions", approved February 27, 1905, acting by and through H. N. Savage Supervising Engineer

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

thereunto duly authorized by the Secretary of the Interior of the said United States in that behalf, does hereby publish and declare as a legal notice to all the world as follows, to-wit:

1. That the said United States has a legal right to the use, possession and control of, and claims 500 cubic feet per second of time of the waters of Post Creek.

2. That the purposes for which said water is claimed are for irrigating, domestic use and power purposes, and the place of intended use is to irrigate and use said water upon 8,000 acres of land, described as follows, to-wit:

Sec. 13 to 14; 22 to 24; 27 to 30, and 32 and 33, T. 19 N., R. 20 W. Sec. 25 and 26, T. 19 N., R. 21 W. also for domestic use in connection with the said land, and for developing power for pumping and other purposes at the point of diversion, and along the irrigating ditches and water conduits to be constructed in connection therewith. [474]

3. That the means of diversion, with size of flume, ditch, pipe or aqueduct by which it is intended to divert said waters is as follows: Diversion dam and canal 14 feet wide and 5 feet deep which will carry and conduct 200 cubic feet of water per second of time from said Post Creek which said diversion dam and canal will divert the water from said stream to a point upon its right bank, which bears N 37° 45' W (mag) distant 158' from SE corner

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

Sec. 12, T. 19 N., R. 20 W. and run thence south-westerly thence over and upon said lands.

4. That the said United States appropriated said water on the 31 day of March, A. D., 1913, and on that day caused a notice of appropriation to be posted in a conspicuous place at the point of diversion hereinbefore described, which said notice stated, among other things:

A. Number of cubic feet of water per second claimed as herein set forth;

B. The purpose for which the water was claimed and the place of intended use, as hereinbefore described;

C. The means of diversion, as herein set forth;

D. The date of appropriation, to-wit: the date on which the said notice was posted;

E. The name of the appropriator as herein set forth.

5. That the name of the appropriator of the said water is the United States of America.

6. That the said United States also hereby claims said ditch and the right of way therefor and for said water by it conveyed, or to be conveyed, from said point of diversion and appropriation to said lands or point of final discharge, and also the right of location upon any lands of any dams, flumes, and reservoirs constructed [475] or to be constructed by the said United States in appropriating and using said water.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

7. That the said United States also claims the right to keep in repair and to enlarge said means of water appropriation at any time and to change the point of diversion and the right to dispose of said right, water ditch or said appurtenances in part or whole, at any time.

Claiming the same all and singular under any and all laws, national and state, and in accordance with the rulings and decisions thereunder in the matter of water rights.

Together with all and singular the hereditaments and appurtenances thereunto belonging and appertaining, or to accrue to the same.

UNITED STATES OF AMERICA,

By: (sgd) H. N. SAVAGE,

Its agent in that behalf and thereunto duly authorized by the Secretary of the Interior of the said United States.

State of Montana

County of Missoula—ss.

E. W. Tappan, having been first duly sworn deposes and says that he is a citizen of the United States and over the age of twenty-one years; that on the 31st day of March, A.D., 1913, in the course of his employment by the United States he posted the above notice at the place named therein at the point described as the point of diversion, and that

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

the matters and facts contained in said notice are true.

(sgd) E. W. TAPPAN.

Subscribed and sworn to before me this first day of April, 1913.

My commission expires.....

(sgd) M. A. O'CONNELL,

Notary Public in and for the State of Montana,
residing at

[476]

(Seal)

Notary Public for the State of Montana residing at
St. Ignatius.

My Commission Expires December 24, 1915.

State of Montana

County of Cascade—ss.

H. N. Savage, having been first duly sworn, deposes and says that he is a citizen of the United States over the age of twenty-one years; that on March 31, 1913, he was and is now an employee of the United States, being Supervising Engineer in charge of the work of the United States in the State of Montana under the act of June 17, 1902 (32 Stat., 388); that he knows the contents of the foregoing notice, and that the matters and facts contained therein are true.

That he caused said notice to be posted on behalf of the United States at the place named therein,

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

and that said notice was so posted as he verily believes.

(sgd) H. N. SAVAGE.

Subscribed and sworn to before me this 4th day of April, 1913.

My commission expires May 24th, 1913.

(Seal) (sgd) R. J. REYNOLDS,
Notary Public in and for the State of Montana, residing at Great Falls, Montana. [477]

Approved by Director Nov. 21, 1912.

Notice of Appropriation for use where part of the water claimed has been perviously diverted.

NOTICE OF APPROPRIATION OF WATER.

United States of America

State of Montana

County of Missoula—ss.

To All Whom These Presents May Concern: Be it known that the United States of America, pursuant to the provisions of the act of June 17, 1902 (32 Stat., 388), and under and by virtue of an act of the Legislative Assembly of the State of Montana, entitled: "An act authorizing the Government of the United States to appropriate the water of the streams in the State of Montana, subject to certain restrictions," approved February 27, 1905,

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

acting by and through H. N. Savage Supervising Engineer thereunto duly authorized by the Secretary of the Interior of the said United States in that behalf, does hereby publish and declare as a legal notice to all the world as follows, to-wit:

1. That the said United States has a legal right to the use, possession and control of, and claims 500 cubic feet per second of time of the waters of Post Creek.

2. That the purposes for which said water is claimed are for irrigating, domestic use and power purposes, and the place of intended use is to irrigate and use said water upon 30,000 acres of land, described as follows, to-wit:

Sections 28 to 36, T. 20 N., R. 20 W.

Sections 1 to 22, T. 19 N., R. 20 W.

Sections 23 to 26, 34 to 36, T. 20 N., R. 21 W.

Sections 1 to 3, 9 to 15, 22 to 27 & 36, T. 19 N., R. 21 W.

also for domestic use in connection with the said land, and for developing power for pumping and other purposes at the point of diversion, and along the irrigating ditches and water conduits to be constructed in connection therewith. [478]

3. That the means of diversion, with size of flume, ditch, pipe or aqueduct by which said waters have been diverted is as follows: Log crib Diversion Dam, headworks and canal 18 ft. wide and 7 ft. deep, which carries and will conduct 400 cubic feet

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

of water per second of time from said Post Creek, which said Log Crib Diversion Dam, Headworks and Canal diverts the water from said stream at a point upon its North bank, which bears N. 46° 58' W (Magnetic) distant 989' from NE corner of NW $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 5, T. 19 N., R. 19 W., and runs thence Westerly, thence over and upon said lands.

4. That the United States appropriated by diverting and putting to beneficial use said water on the 9 day of May, 1912, and on March 29, 1913 caused a notice of appropriation to be posted in a conspicuous place at the point of diversion hereinbefore described, which said notice stated among other things:

A. Number of cubic feet of water per second claimed as herein set forth;

B. The purpose for which the water was claimed and the place of intended use, as hereinbefore described;

C. The means of diversion, as herein set forth;

D. The date of appropriation, to-wit: the date on which the said water was diverted;

E. The name of the appropriator as herein set forth.

5. That the name of the appropriator of the said water is the United States of America.

6. That the said United States also hereby claims said ditch and the right of way therefor and for said water by it conveyed, or to be conveyed,

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

from said point of diversion and appropriation to said lands or point of final discharge, and also the right of location upon any lands of any dams, flumes, and reservoirs constructed or to be constructed by the said United States in appropriating and using said water. [479]

7. That the said United States also claims the right to keep in repair and to enlarge said means of water appropriation at any time and to change the point of diversion and the right to dispose of said right, water, ditch or said appurtenances in part or whole, at any time.

Claiming the same all and singular under any and all laws, national and state, and in accordance with the rulings and decisions thereunder in the matter of water rights.

Together with all and singular the hereditaments and appurtenances thereunder belonging and appertaining, or to accrue to the same.

UNITED STATES OF AMERICA,

By: (sgd) H. N. SAVAGE,

Its agent in that behalf and thereunto duly authorized by the Secretary of the Interior of the said United States.

1-29-13

State of Montana

County of Missoula—ss.

E. W. Tappan, having been first duly sworn, deposes and says that he is a citizen of the United

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

States and over the age of twenty-one years; that on the 29th day of March, A. D. 1913, in the course of his employment by the United States he posted the above notice at the place named therein at the point described as the point of diversion, and that the matters and facts contained in said notice are true.

(sgd) E. W. TAPPAN.

Subscribed and sworn to before me this First day of April, 1913.

My commission expires.....

(Seal) (sgd) M. A. O'CONNELL,

Notary Public in and for the State of Montana,
residing at

Notary Public for the State of Montana residing at
St. Ignatius.

My commission expires December 24, 1915. [480]

State of Montana

County of Cascade—ss.

H. N. Savage, having been first duly sworn, deposes and says that he is a citizen of the United States over the age of twenty-one years; that on March 29, 1913, he was and is now an employee of the United States, being Supervising Engineer in charge of the work of the United States in the state of Montana, under the act of June 17, 1902 (32 Stat., 388); that he knows the contents of the fore-

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

going notice, and that the matters and facts contained therein are true;

That he caused said notice to be posted on behalf of the United States at the place named therein, and that said notice was so posted as he verily believes.

(Sgd) H. N. SAVAGE.

Subscribed and sworn to before me this 4th day of April, 1913.

My commission expires May 24th, 1913.

(Seal) (sgd) R. J. REYNOLDS,

Notary Public in and for the State of Montana, residing at Great Falls, Mont. [481]

Approved by Director Nov. 21, 1912.

Notice of Appropriation for use where part of the water claimed has been previously diverted.

NOTICE OF APPROPRIATION OF WATER.

United States of America,
State of Montana
County of Missoula—ss.

To All Whom These Presents May Concern: Be it known that the United States of America, pursuant to the provisions of the act of June 17, 1902 (32 Stat., 388), and under and by virtue of an act of the Legislative Assembly of the State of Montana,

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

entitled: "An act authorizing the Government of the United States to appropriate the water of the streams in the State of Montana, subject to certain restrictions," approved February 27, 1905, acting by and through H. N. Savage, Supervising Engineer thereunto duly authorized by the Secretary of the Interior of the said United States in that behalf, does hereby publish and declare as a legal notice to all the world as follows, to-wit:

1. That the said United States has a legal right to the use, possession and control of, and claims 500 cubic feet per second of time of the waters of Post Creek.

2. That the purposes for which said water is claimed are for irrigating, domestic use and power purposes, and the place of intended use is to irrigate and use said water upon 50,000 acres of land, described as follows, to-wit:

Sections 5 to 8, 17 to 20, 29 to 32, T 21 N, R 19 W.

Sections 4 to 9, 16 to 21, 28 to 33, T 20 N, R 19 W.

Sections 28 to 33, T 22 N, R 19 W.

Sections 1 to 36, T 21 N, R 20 W.

Sections 1 to 36, T 20 N, R 20 W.

Sections 13 to 36, T 21 N, R 21 W.

also for domestic use in connection with the said land, and for developing power for pumping and other purposes at the point of diversion, and along the irrigating ditches and water conduits to be constructed in connection therewith. [482]

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

3. That the means of diversion, with size of flume, ditch, pipe or aqueduct by which said waters have been diverted is as follows: Log Crib Diversion Dam, headworks and canal, 15 ft. wide and 6 ft. deep which carries and will conduct 200 cubic feet of water per second of time from said Post Creek which said Log Crib Diversion Dam, Headworks and Canal diverts the water from said stream at a point upon its North bank, which bears S 78° 15' W (Magnetic) dist. 902' from the E $\frac{1}{4}$ corner sec. 4, T 19 N, R 19 W and runs thence Northerly, thence over and upon said lands.

4. That the United States appropriated by diverting and putting to beneficial use said water on the 5 day of April, 1912, and on March 29, 1913 caused notice of appropriation to be posted in a conspicuous place at the point of diversion hereinbefore described, which said notice stated among other things.

A. Number of cubic feet of water per second claimed as herein set forth;

B. The purpose for which the water was claimed and the place of intended use, as hereinbefore described;

C. The means of diversion, as herein set forth;

D. The date of appropriation, to-wit: the date on which the said water was diverted;

E. The name of the appropriator as herein set forth.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

5. That the name of the appropriator of the said water is the United States of America.

6. That the said United States also hereby claims said ditch and the right of way therefor and for said water by it conveyed or to be conveyed, from said point of diversion and appropriation to said lands or point of final discharge, and also the right of location upon any lands of any dams, flumes, and reservoirs constructed or to be constructed by the said United States in appropriating and using said water. [483]

7. That the said United States also claims the right to keep in repair and to enlarge said means of water appropriation at any time and to change the point of diversion and the right to dispose of said right, water, ditch or said appurtenances in part or whole, at any time.

Claiming the same all and singular under any and all laws, national and state, and in accordance with the rulings and decisions thereunder in the matter of water rights.

Together with all and singular the hereditaments and appurtenances thereunder belonging and appertaining, or to accrue to the same.

UNITED STATES OF AMERICA

By: H. N. SAVAGE

Its agent in that behalf and thereunto duly authorized by the Secretary of the Interior of the said United States.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

State of Montana

County of Missoula—ss.

E. W. Tappan, having been first duly sworn deposes and says that he is a citizen of the United States and over the age of twenty-one years; that on the 29th day of March, A. D., 1913, in the course of his employment by the United States he posted the above notice at the place named therein at the point described as the point of diversion, and that the matters and facts contained in said notice are true.

(sgd) E. W. TAPPAN

Subscribed and sworn to before me this First day of April, 1913.

My commission expires.....

[Seal] (sgd) M. A. O'CONNELL

Notary Public in and for the State of Montana, residing at.....

Notary Public for the State of Montana, Residing at St. Ignatius.

My commission expires December 24, 1915. [484]

State of Montana

County of Cascade—ss.

H. N. Savage, having been first duly sworn, deposes and says that he is a citizen of the United States over the age of twenty-one years; that on March 29th, 1913, he was and is now an employee

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

of the United States, being Supervising Engineer in charge of the work of the United States in the State of Montana, under the act of June 17, 1902 (32 Stat., 388); that he knows the contents of the foregoing notice, and that the matters and facts contained therein are true;.

That he caused said notice to be posted on behalf of the United States at the place named therein, and that said notice was so posted as he verily believes.

(sgd) H. N. SAVAGE

Subscribed and sworn to before me this 4th day of April, 1913.

My commission expires May 24th, 1913.

[Seal] (sgd) R. J. REYNOLDS

Notary Public in and for the State of Montana, residing at Great Falls, Mont. [485]

Q. I hand you Plaintiff's offered exhibit 7 and will ask you to identify it?

The Court: Another water right?

Mr. Simmons: No, this is a letter of instructions, to the private water rights committee.

A. This is a certified copy of a letter to the Superintendent of the Flathead Reservation from the Second Assistant Commissioner of Indian Affairs, giving certain instructions as to the formation

(Testimony of W. S. Hama.)

of a committee and the actions of a committee in determining the private water rights.

Mr. Simmons: A letter setting up personal instructions in regard to the committee which was appointed.

The Court: Submit it to counsel.

Mr. Simmons: I have submitted copies to both counsel.

The Court: Very well, any objection.

Mr. Smith: No objection.

Mr. Wallace: No objection so far as the defendants are concerned.

The Court: In evidence without objection.

Plaintiff's Exhibit 7, the document referred to, was thereupon received in evidence without objection and the same is on file with and forms a part of the original exhibits in this case.

PLAINTIFF'S EXHIBIT 7

Department of the Interior

Office of Indian Affairs

Washington

June 27, 1912.

Mr. Fred C. Morgan,
Superintendent Flathead School.

Sir:

The Office is in receipt of a letter from Edward Clairmont, dated February 14, 1912, transmitting copies of notices of appropriation of water in Mis-

(Testimony of W. S. Hanna.)

soula County, Montana, in which he represents that the ditches were constructed out of private funds, and that he should be confirmed and protected in his water rights.

Your letter of February 14, 1912, reporting the inclination of the Indians to continue the use of private and old government ditches in preference to taking water from the new system being constructed by the Reclamation Service, taken in connection with Mr. Clairmont's letter, would seem to indicate that if all those who have farms irrigable by ditches built with private funds are protected in their water rights and not charged for construction of the new project, their objections to the new project might be overcome. With this end in view, the matter was referred to the Secretary of the Interior with recommendation that a committee, which shall include the Superintendent of the reservation, the Engineer engaged in the work, and an Indian to be selected by the Indians, be appointed to make an examination for the purpose of determining the lands so affected, and that all lands so irrigated should be determined to have a paid-up water right under the new system.

The Secretary approved the first recommendation, that an examination be made by a committee so constituted, which should report its findings with recommendations as to whether, and to what [487] extent, the old ditches should be taken into consideration on the question of charges for construction

(Testimony of W. S. Hanna.)

cost, but withheld action on the second recommendation until after receipt of the report required.

You will therefore take the necessary action to carry out these instructions. The lands irrigated by ditches constructed by the Government, should be considered for the purpose of the report called for, as not being supplied with water at private cost. It should be clearly explained to the Indians that no irrigation ditches can be made to supply water without being kept in order and that all lands irrigable therefrom will have to bear their proportionate cost of the maintenance and operation expenses. For the present season this charge will not be assessed against Indians, but will be borne by the tribe through reimbursement of appropriations made by Congress for carrying on the work of construction. It would be unfair to those Indians whose lands cannot be watered from any ditch to pay out of tribal funds the expense of furnishing water to a favored few, consequently the Office believes the best policy for the next irrigation season would be for all who receive water to pay the maintenance charge.

Allottees using water from private ditches constructed prior to the construction of the reclamation project should be allowed to maintain and operate their own ditches as heretofore, if they wish to do so, at least until the new systems are completed and placed in commission.

There are inclosed herewith copies of Reclamation

(Testimony of W. S. Hanna.)

Service letters bearing upon this subject, which contain instructions for the Project Engineer to make surveys of the private ditches and area irrigated therefrom. The committee should give careful consideration to all evidence of irrigation during the past as well [488] as the present time, the size and capacity of the ditches, with the view of protecting the Indians in private water rights as far as their industry and activity will permit.

Respectfully,

C. F. HAUKE

Second Assistant Commissioner.

[489]

Q. I show you plaintiff's offered exhibit number 8 and will ask you to identify it?

A. This is a certified copy of the report of the committee [213] appointed by the Secretary to investigate private water rights.

Q. What is the date of it?

A. December 10, 1910.

Q. From whom and to whom?

A. To the Commissioner of Indian Affairs; the report is made by Theodore Sharp, Chairman, Superintendent and Special Disbursing Agent Flathead Agency; Alphonse Clairmont, Representative elected by the Indian Council and member of the Flathead Tribe; and A. P. Smythe, Assistant Engineer, United States Reclamation Service.

Mr. Simmons: If the Court please this con-

(Testimony of W. S. Hanna.)

tains the report of the private water rights committee and the recommendations of each right which the committee recommends the Secretary should grant. And I offer the Plaintiff's Exhibit 8 in evidence.

The Court: Any objection?

Mr. Wallace: No objection on the part of the defendants.

Mr. Smith: No objection.

The Court: In evidence without objection.

Plaintiff's Exhibit 8, being the document referred to, was then received in evidence without objection and is a part of the original exhibits on file in this case.

PLAINTIFF'S EXHIBIT 8

Department of the Interior
United States Indian Service
Flathead Agency

Dixon, Montana
December 10, 1919

The Commissioner of Indian Affairs,
Washington, D. C.

Sir:

The first findings on water rights on the Flathead Indian Reservation were submitted by a committee appointed by the Commissioner of Indian Affairs, consisting of Fred C. Morgan, Superintendent of Flathead Indian School, Foster Towle, Assistant Engineer, U. S. Reclamation Service, and Alphonse

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

Clairmont, a member of the Flathead Tribe. This committee made a report on the water rights of the Jocko Drainage Basin which was submitted on January 15, 1914.

On July 21, 1917, a committee composed of Fred C. Morgan, Superintendent of Flathead Indian School, F. T. Crowe, Project Manager, U. S. Reclamation Service, and Alphonse Clairmont, a member of the Flathead Tribe, made a report on the water rights of Garden Creek.

Under date of September 17, 1918, Theodore Sharp was appointed to succeed Fred C. Morgan on this Committee and on March 26, 1919, the appointment of A. P. Smyth, Assistant Engineer, U. S. Reclamation Service, to succeed Foster Towle was approved by your office.

The following are the principles observed in making the findings of the Committee last mentioned above, together with recommendation with regard to the taking over of old ditches. [491]

The Committee met on April 28, 1919, at St. Ignatius, Montana, and organized by electing Theodore Sharp as Chairman. All persons owning or occupying land upon or tributary to these streams were notified by published notices in local papers and by posting notices in local postoffices that they might present their claims, if any, in person or in writing to the use of waters of the Flathead Indian Reservation.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

Examination of the streams, the works diverting water therefrom and the irrigated lands were made by the Committee in person and an engineer employee of the U. S. Reclamation Service made a map on a scale of 1000 feet to the inch, showing the course of said streams, the location of the ditch or canal diverting water therefrom, and the legal sub-division of lands, which have been irrigated or are susceptible of irrigation from canals already constructed which maps are attached and made a part hereof.

The Committee is required to determine the status of all water right claims conflicting with the United States and to make recommendation as to whether and to what extent the old ditches should be taken into consideration on the question of charges for construction and operation and maintenance cost.

A previous report has been submitted by a Committee consisting of Fred C. Morgan, Alphonse Clairmont and Foster Towle for the lands in Jocko Valley; and by a Committee consisting of Fred C. Morgan, Alphonse Clairmont and F. T. Crowe for lands tributary to Garden Creek.

The principles observed in making the findings of the Committee were as follows: The State of Montana was admitted to the Union November 8, 1889, whereas the Flathead Reservation was established by the Treaty with the Indians of July 16, 1855. Water being essential to industrial prosper-

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

ity a reservation of Indian land carries with it an implied reservation of sufficient water, to serve the irrigable land within such reservation, of all natural streams, springs, lakes or other collections of still water within the boundaries of the said tract.

[492]

The waters of the Flathead Indian Reservation are therefore inseparably appurtenant to the allotted lands and the unallotted irrigable lands of the Reservation, and were, in substance, appropriated to these lands when the Reservation was established, and its control must vest in the United States Government.

Section 9 of the Act of May 29, 1908, authorizes the Secretary of the Interior to perform any and all acts to make such rules and regulations as may be necessary and proper for the purpose of carrying into effect the provision for the irrigation of the allotted lands and the unallotted irrigable lands to be disposed of under the Act of April 23, 1904.

A right to the use of water of the reservation must be acquired by the beneficial application of water under such rules and regulations as the Secretary of the Interior may make.

In order that equity shall be done to all the various interests involved it is recommended that water rights be determined under the following regulations:

Beneficial use prior to the appropriation by the

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

United States shall be the basis, the measure and the limit of the right to the use of these waters at all times irrespective of the carrying capacity of the ditch and not exceeding for irrigation a limit of two acre feet per acre per annum at the point of diversion; that the right to the use of water for irrigation shall be inseparably appurtenant to the land and no right for the use of water for irrigation can be acquired independent of its use upon and attached to definite tracts of land and that water rights cannot be detached from the land, place or purpose for which they were acquired without the loss of priority.

The Secretary of the Interior shall appoint the Engineer in charge of the Reclamation work on the Flathead Indian Reservation to act as Water Commissioner for the Flathead Indian Reservation, and it shall be [493] the duty of said water commissioner to divide the water of the natural stream or streams among the several ditches taking water therefrom according to the prior right of each. Said water commissioner shall have authority to regulate the distribution of water among the various users under any particular ditch.

All persons using water under a decree of the Secretary of the Interior are required to have suitable headgates at the point wherein the ditch taps the stream and shall also, at some suitable place on the ditch and as near the head thereof as prac-

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

ticable, place and maintain a proper measuring box, weir, or other appliance for the measurement of the water flowing in said ditch. In case any person or person shall fail to place or maintain a proper measuring appliance it shall be the duty of said water commissioner not to apportion or distribute any water through said ditch.

The Committee recommends that wherever practicable the United States refrain from destroying private ditches; that the allottee or his successor in interest be allowed to use his old ditches to irrigate that portion of his allotment that is determined to have a valid water right, but if the allottee elects to exchange his water right for a water right in a Government ditch he should be entitled to a paid-up water right to the extent of one hundred per cent (100%) of the cost of construction for that acreage that is determined to have a valid water right; but that he should be required to pay operation and maintenance charges on the total irrigable acreage of his allotment. If it is determined that it is to the best interest of the United States to destroy these ditches then said individual or corporation should be entitled to a paid-up water right to the extent of one hundred per cent (100%) of the cost of construction with no charges for operation and maintenance for that portion of his allotment which is determined to have a valid water right. [494]

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

Edward Deschamps

Allotment No. 783

E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W.

..... Sec., T. N., R. W.

The Committee, on May 16, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Edward Deschamps being Allotment No. 783, comprising the E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 17, T. 18 N., R. 19 W., and Sec., T. N., R. W., and testimony was taken on November 12, 1913 and May 16, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 19, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that

Joseph McDonald and Joseph Deschamps, in 1906, constructed a ditch diverting water from Post Creek at a point on the left bank in SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10, T. 19 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that ever since said date there have been irrigated 9.5 acres in SE $\frac{1}{4}$ SE $\frac{1}{4}$ and 0.8 acres in NE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W.;

that said 10.3 acres hereinbefore described are determined to have a valid and subsisting water right from Post Creek to the extent of 2 acre feet per acre per annum or a total of 20.6 acre feet per an-

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

num; that none of the remaining area of said allotment has a water right from any source.

Oro Deschamps

Allotment No. 784

W $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W.

..... Sec., T. N., R. W.

The Committee, on May 16, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Oro Deschamps being Allotment No. 784, comprising the W $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., and Sec., T. N., R. W., and testimony was taken on November 12, 1913 and May 16, 1919.

[495]

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 19, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that in 1906

Joseph Deschamp and Joe McDonald constructed a ditch diverting water from Post Creek at a point on the left bank in SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10, T. 19 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that ever since said date there have been irrigated 4.8 acres in NW $\frac{1}{4}$ SE $\frac{1}{4}$ and 9.3 acres in SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W.;

that said 14.1 acres hereinbefore described are determined to have a valid and subsisting water right

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

from Post Creek to the extent of 2 acre feet per acre per annum or a total of 28.2 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

William Deschamps

Allotment No. 781

SW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 16, T. N., R. W.

SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W.

The Committee, on May 16, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the land of William Deschamps being Allotment No. 781, comprising the SW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., and SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., and testimony was taken on November 12, 1913 and May 16, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 19, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that Joseph Deschamps and Joe McDonald in 1906 constructed a ditch diverting water from Post Creek at a point on the left bank in SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10, [496] T. 19 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that ever since said date there have been irrigated 9.6 acres in SW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 16 and 1.5 acres in SE $\frac{1}{4}$ NE $\frac{1}{4}$

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

Sec. 17, T. 19 N., R. 19 W.; that said 11.1 acres hereinbefore described are determined to have a valid and subsisting water right from Post Creek to the extent of 2 acre feet per acre per annum or a total of 22.2 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

Frank Fiddler

Allotment No. 785

W $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W.

..... Sec., T. N., R. W.

The Committee, on May 16, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Frank Fiddler being Allotment No. 785, comprising the W $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., and Sec., T. N., R. W., and testimony was taken on November 13, 1913, and May 16, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 19, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that Joseph McDonald and William, Edward and Joseph Deschamps in 1906 constructed a ditch diverting water from Post Creek at a point on the left bank in SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10, T. 19 N., R. 19 W., for the purpose of conveying water upon portions of

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

this allotment; that ever since said date there have been irrigated 0.9 acres in NW $\frac{1}{4}$ SW $\frac{1}{4}$ and 17.4 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W.; that said 18.3 acres hereinbefore described are determined to have a valid and subsisting water right from Post Creek to the extent of 2 acre feet per acre per annum or a total of 36.6 acre feet per annum; that none of the remaining area of said allotment has a water right from any source. [497]

Duncan McDonald

Allotment No. 561

E $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W.

..... Sec., T. N., R. W.

The Committee, on May 16, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Duncan McDonald being allotment No. 561, comprising the E $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., and Sec., T. N., R. W., and testimony was taken on November 12, 1913, and

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 19, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that Joe McDonald and William Deschamps in 1906 constructed a ditch diverting water from Post Creek at a point on the left bank in SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10, T. 19 N.,

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

R. 19 W., for the purpose of conveying water upon portions of this allotment; that ever since said date there have been irrigated 7.3 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ and 9.5 acres in SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W.; that said 16.8 acres hereinbefore described are determined to have a valid and subsisting water right from Post Creek to the extent of 2 acre feet per acre per annum or a total of 33.6 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

Florence McDonald

Allotment No. 560

SW $\frac{1}{4}$ NE $\frac{1}{4}$ & NW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 16, T. 19 N.,
R. 19 W.

..... Sec., T. 19 N., R. W.

The Committee, on May 16th, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Florence McDonald being Allotment No. 560, comprising the SW $\frac{1}{4}$ NE $\frac{1}{4}$ & NW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., and Sec., T. N., R. W., and testimony was taken on November 12, 1913 and May 16, 1919. [498]

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 19, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that Joseph Mc-

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

Donald, William, Edward and Joseph Deschamps in 1906 constructed a ditch diverting water from Post Creek at a point on the left bank in SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10, T. 19 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that ever since said date there have been irrigated 6.3 acres in SW $\frac{1}{4}$ NE $\frac{1}{4}$ and 1.9 acres in NW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W.; that said 8.2 acres hereinbefore described are determined to have a valid and subsisting water right from Post Creek to the extent of 2 acre feet per acre per annum or a total of 16.4 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

Mary C. McDonald

Allotment No. 559

SE $\frac{1}{4}$ NW $\frac{1}{4}$ & NE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W.

..... Sec., T. N., R. W.

The Committee, on May 16, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Mary C. McDonald being Allotment No. 559, comprising the SE $\frac{1}{4}$ NW $\frac{1}{4}$ & NE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., and Sec., T. N., R. W., and testimony was taken on November 12, 1913 and May 16, 1919.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, sheet 19, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that Joseph McDonald and William, Edward and Joseph Deschamps in 1906 constructed a ditch diverting water from Post Creek at a point on the left bank in SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10, T. 19 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that ever since said date there have been irrigated 0.8 acres in SE $\frac{1}{4}$ NW $\frac{1}{4}$ and 2.4 acres in NE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W.; [499] that said 3.2 acres hereinbefore described are determined to have a valid and subsisting water right from Post Creek to the extent of 2 acre feet per acre per annum or a total of 6.4 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

Caroline McKeever

Allotment No. 791

N $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 21, T. 19 N., R. 19 W.

..... Sec., T. N., R. W.

The Committee, on May 16, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Caroline McKeever being Allotment No. 791, comprising the N $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 21, T. 19 N., R. 19 W., and

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

Sec. T. N., R. W., and testimony was taken on November 13, 1913 and May 16, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 19, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that Caroline McKeever in 1908 extended the McDonald-Deschamps ditch diverting water from Post Creek at a point on the left bank in $SE\frac{1}{4}NW\frac{1}{4}NE\frac{1}{4}$ Sec. 10, T. 19 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that at various times since said date there have been irrigated 1.3 acres in $NW\frac{1}{4}NW\frac{1}{4}$ and 0.1 acres in $NE\frac{1}{4}NW\frac{1}{4}$ Sec. 21, T. 19 N., R. 19 W.; that said 1.4 acres hereinbefore described are determined to have a valid and subsisting water right from Post Creek to the extent of 2 acre feet per acre per annum or a total of 2.8 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

Emma M. Magee

Allotment No. 688

$E\frac{1}{2}SE\frac{1}{4}$ Sec. 18, T. 19 N., R. 19 W.

..... Sec., T. N., R. W.

The Committee, on May 27, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of [500] Emma M.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

Magee being Allotment No. 688, comprising the E $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 18, T. 19 N., R. 19 W., and Sec., T. N., R. W., and testimony was taken on November 13, 1913, and May 27, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 19, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that A. D. Magee, the husband of the allottee, in 1908 extended the ditch constructed by George Buckhouse for the Minesinger lands and diverting water from Post Creek at a point on the left bank in SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10, T. 19 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that since 1908 there have been irrigated 40 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ and 40 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 18, T. 19 N., R. 19 W.; that said 80 acres hereinbefore described are determined to have a valid and subsisting water right from Post Creek to the extent of 2 acre feet per acre per annum or a total of 160 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

John Minesinger

Allotment No. 690

S $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W.

..... Sec., T. N., R. W.

The Committee, on May 27, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of John Minesinger being Allotment No. 690, comprising the S $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., and Sec., T. N., R. W., and testimony was taken on November 13, 1913 and May 27, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 19, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that [501] George Buckhouse, at that time renter of this allotment, in 1907 and 1908 constructed a ditch diverting water from Post Creek at a point on the left bank in SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10, T. 19 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that since 1908 there have been irrigated 38.7 acres in SW $\frac{1}{4}$ NW $\frac{1}{4}$ and 36.7 acres in SE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W.; that said 75.4 acres hereinbefore described are determined to have a valid and subsisting water right from Post Creek to the extent of 2 acre feet per acre per annum or a total of 150.8 acre feet per annum; that

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

none of the remaining area of said allotment has a water right from any source.

Julia Minesinger

Allotment No. 691

N $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W.

..... Sec., T. N., R. W.

The Committee, on May 27, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Julia Minesinger being Allotment No. 691, comprising the N $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., and Sec., T. N., R. W., and testimony was taken on November 13, 1913 and May 27, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 19, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that George Buckhouse, at that time renter of this allotment, in 1907 and 1908 constructed a ditch diverting water from Post Creek at a point on the left bank in SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10, T. 19 N., R 19 W., for the purpose of conveying water upon portions of this allotment; that since 1908 there have been irrigated 39.1 acres in NW $\frac{1}{4}$ NW $\frac{1}{4}$ and 38.3 acres in NE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W.; that said 77.4 acres hereinbefore described are determined to have a valid and subsisting water right from Post Creek

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

to the extent of 2 acre feet per acre per annum or a total of 154.8 acre feet per annum; that none of the remaining area of said allotment has a water right from any source. [502]

James Waymack

Allotment No. 689

W $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W.

..... Sec., T. N., R. W.

The Committee, on May 27, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of James Waymack being Allotment No. 689, comprising the W $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., and Sec., T. N., R. W., and testimony was taken on November 13, 1913 and May 27, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, sheet 19, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that A. D. Magee, the step-father of the allottee, in 1908 extended the ditch constructed by George Buckhouse for the Minesinger lands and diverting water from Post Creek at a point on the left bank in SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10, T. 19 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that since 1908 there have been irrigated 39.3 acres in NW $\frac{1}{4}$ SW $\frac{1}{4}$ and 13 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

17, T. 19 N., R. 19 W.; that said 52.3 acres hereinbefore described are determined to have a valid and subsisting water right from Post Creek to the extent of 2 acre feet per acre per annum or a total of 104.6 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

This report covers all streams in the Mission, Little Bitter Root, Camas and Lower Joeko Valleys, and includes the following streams and their tributaries:

Sabine Creek

Dry Creek near St. Ignatius

Mission Creek

Ashley Creek

South Fork of Ashley or Dry Creek

Poison Oak Creek

Post Creek

Marsh Creek [503]

Crow Creek

Spring Creek near Ronan

Mud Creek

Ashley Creek near Mud Creek

Courville Creek

Big Creek near Bisson Creek

Dunbay Creek

Minesinger Creek

Bisson Creek

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

Meadow Creek

Moss Creek

Big Creek at Polson

Dayton Creek

Big Creek at Eudora

Sullivan Creek

Little Bitter Root River

Dry Fork Creek

Warm Springs Creek

Markle Creek

Cottonwood Creek

Sweetwater Creek

Michel Creek

Camas Creek

Revais Creek

Selow Creek

Jocko River

The only water rights to the use of the water of these streams are those hereinbefore delineated.

Filings are continually being made in Sanders, Missoula and Flathead Counties claiming rights to the use of the waters of the streams of the [504] Flathead Reservation. These waters are determined by the committee to be a tribal asset of the Indians allotted on the Flathead Reservation and to be appurtenant to the allotted lands and the unallotted irrigable lands as approved by the Secretary of the Interior and settlers on ceded lands are subordi-

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

nate in right to the needs and uses of the Indian allotments and farm units.

Very respectfully,

(Sgd) THEODORE SHARP

Chairman

Supt. & S. D. A.,

Flathead Agency.

(Sgd) ALPHONSE CLAIRMONT

Representative elected by the
Indian Council and member
of the Flathead Tribe.

(Sgd) A. P. SMYTHE

Assistant Engineer, U. S. Rec-
lamation Service. [505]

Q. I hand you Plaintiff's Exhibit 9 and will ask you to identify it?

A. This is a certified copy of a letter addressed to the Secretary of the Interior by the Commissioner of Indian Affairs, forwarding the report of the committee, which is the previous exhibit; and this shows the concurrence of the [214] Acting Director of the Reclamation Service and the approval of the Assistant Secretary of the Interior.

Mr. Simmons: I offer this Plaintiff's Exhibit 9 in evidence.

The Court: In evidence without objection.

(Testimony of W. S. Hanna.)

Plaintiff's Exhibit 9, the document referred to, was then admitted in evidence without objection and is a part of the original exhibits on file in this case.

PLAINTIFF'S EXHIBIT 9

United States Department of the Interior.
Office of Indian Affairs.
Washington.

May 24, 1921

The Honorable

The Secretary of the Interior

(Through Director, Reclamation Service).

My dear Mr. Secretary:

The Commission, comprising the Superintendent of the Flathead Reservation, the Reclamation Service Project Manager, and an Indian selected by the Flathead Tribe, appointed for the purpose of determining old water rights on the Flathead Indian Reservation, Montana, has reported with respect to existing rights of all persons owning or occupying land upon streams within the Flathead Indian Reservation. This report also covers those lands held by eleemosynary societies at St. Ignatius and white owners who have been adopted into the tribes. After having conducted surveys and investigations on the ground and considered testimony brought out at a hearing called for the purpose, the Commission submits its report, consisting of four volumes, as follows:

(Testimony of W. S. Hanna.)

“The Committee met on April 28, 1919, at St. Ignatius, Montana, and organized by electing Theodore Sharp as Chairman. All persons owning or occupying land upon or tributary to these streams were notified by published notices in local papers and by posting notices in local postoffices that they might present their claims, if any, in person or in writing to the use of waters of the Flathead Indian Reservation.

“Examination of the streams, the works diverting water therefrom and the irrigated lands were made by the Committee in person and an engineer employee of the U. S. Reclamation Service made a map on a scale of 1000 feet to the inch, showing the course of said streams, the location of the ditch or canal diverting water therefrom, and the legal sub-division of lands, which have been irrigated or are susceptible of irrigation from canals already constructed which maps are attached and made a part hereof.

“The Committee is required to determine the status of all water right claims conflicting with the United States and to make recommendation as to whether and to what extent the old ditches should be taken into consideration on the question of charges for construction and operation and maintenance cost. [507]

“A previous report has been submitted by a Committee consisting of Fred C. Morgan, Al-

(Testimony of W. S. Hanna.)

phonse Clairmont and Foster Towle for the lands in Jocko Valley; and by a Committee consisting of Fred C. Morgan, Alphonse Clairmont and F. T. Crowe for lands tributary to Garden Creek.

“The principles observed in making the findings of the Committee were as follows: The State of Montana was admitted to the Union November 8, 1889, whereas the Flathead Reservation was established by the Treaty with the Indians of July 16, 1855. Water being essential to industrial prosperity a reservation of Indian land carries with it an implied reservation of sufficient water, to serve the irrigable land within such reservation, of all natural streams, springs, lakes or other collections of still water within the boundaries of the said tract.

“The waters of the Flathead Indian Reservation are therefore inseparably appurtenant to the allotted lands and the unallotted irrigable lands of the Reservation, and were, in substance, appropriated to these lands when the Reservation was established, and its control must vest in the United States Government.

“Section 9 of the Act of May 29, 1908, authorizes the Secretary of the Interior to perform any and all acts to make such rules and regulations as may be necessary and proper for the purpose of carrying into effect the

(Testimony of W. S. Hanna.)

provisions for the irrigation of the allotted lands and the unallotted irrigable lands to be disposed of under the Act of April 23, 1904.

“A right to the use of water of the reservation must be acquired by the beneficial application of water under such rules and regulations as the Secretary of the Interior may make.

“In order that equity shall be done to all the various interests involved it is recommended that water rights be determined under the following regulations:

“Beneficial use prior to the appropriation by the United States shall be the basis, the measure and the limit of the right to the use of these waters at all times irrespective of the carrying capacity of the ditch and not exceeding for irrigation a limit of two acre feet per acre per annum at the point of diversion; that the right to the use of water for irrigation shall be inseparably appur- [508] tenant to the land and no right for the use of water for irrigation can be acquired independent of its use upon and attached to definite tracts of land and that water rights cannot be detached from the land, place or purpose for which they were acquired without the loss of priority.

“The Secretary of the Interior shall appoint the Engineer in charge of the Reclamation work on the Flathead Indian Reservation to act

(Testimony of W. S. Hanna.)

as Water Commissioner for the Flathead Indian Reservation, and it shall be the duty of said water commissioner to divide the water of the natural stream or streams among the several ditches taking water therefrom according to the prior right of each. Said water commissioner shall have authority to regulate the distribution of water among the various users under any particular ditch.

“All persons using water under a decree of the Secretary of the Interior are required to have suitable headgates at the point wherein the ditch taps the stream and shall also, at some suitable place on the ditch and as near the head thereof as practicable, place and maintain a proper measuring box, weir, or other appliance for the measurement of the water flowing in said ditch. In case any person or persons shall fail to place or maintain a proper measuring appliance it shall be the duty of said water commissioner not to apportion or distribute any water through said ditch.

“The Committee recommends that wherever practicable the United States refrain from destroying private ditches; that the allottee or his successor in interest be allowed to use his old ditches to irrigate that portion of his allotment that is determined to have a valid water right, but if the allottee elects to exchange his water right for a water right in a Government ditch

(Testimony of W. S. Hanna.)

he should be entitled to a paid-up water right to the extent of one hundred per cent (100%) of the cost of construction for that acreage that is determined to have a valid water right; but that he should be required to pay operation and maintenance charges on the total irrigable acreage of his allotment. If it is determined that it is to the best interest of the United States to destroy these ditches then said individual or corporation should be entitled to a paid-up water right to the extent of one hundred per cent (100%) of the cost of construction with no charges for operation and maintenance for that portion of his allotment which is determined to have a valid water right."

It will be noted that the Commission recommends that in those cases where it is deemed advisable for the United States to destroy private ditches and construct a new ditch, the owner or owners of said old ditch shall be entitled to a paid-up water [509] right to the extent of 100% of the cost of construction, with no charges for operation and maintenance, for that part of his allotment which is determined to have a valid water right. While it is believed to be equitable and just in such cases to grant the Indian what is known as a paid-up water right, nevertheless it is believed that such land should not be granted paid-up operation and maintenance in perpetuity. Such charges are paid annually as a

(Testimony of W. S. Hanna.)

general rule and to concur in this respect with the Commission's report might in the future cause considerable dissatisfaction among various land owners.

It is therefore respectfully recommended that the report submitted herewith be approved with a slight modification relative to the matter of paid-up operation and maintenance charges referred to above, to the effect that the Secretary of the Interior in all such cases shall determine whether or not such persons shall in addition to being granted a full paid-up water right, also be granted free operation and maintenance charges.

Cordially yours,

(SGD) CHAS. H. BURKE

Commissioner.

I concur: May 24, 1921

(SGD) MORRIS BIEN

Acting Director

Reclamation Service.

Approved: Nov. 25, 1921

(SGD) F. M. GOODWIN

Assistant Secretary. [510]

Q. I hand you Plaintiff's Exhibit 10—offered exhibit 10—and will ask you to identify it?

A. This is a certified copy of that portion of the committee report referring to the lands of the defendants in this case; these copies are certified

(Testimony of W. S. Hanna.)

by the Acting Commissioner of Indian Affairs under date December 19, 1939.

Mr. Simmons: It contains the surveys and reports of this engineer in studying these private water rights and report made thereon by the engineer of the Reclamation Service. We offer Plaintiff's Exhibit 10 in evidence.

Mr. Wallace: We have no objection.

The Court: Very well, in evidence without objection.

Plaintiff's Exhibit 10, the document referred to, was then received in evidence without objection and the same is a part of the original exhibits on file in this case.

PLAINTIFF'S EXHIBIT 10

Allottee Florence McDonald Allotment No. 560

Post Creek Near St. Ignatius

I, R. W. Lincoln, Junior Engineer, U. S. Reclamation Service certify that I have been employed on the Flathead Indian Reservation on the survey of private lands from October 30, 1914, to November 30, 1914; that the allotment number and property ownership were taken from the official allotment plats prepared in 1910 under the direction of Fred C. Morgan, Superintendent and Special Disbursing Officer, Flathead Schools; that I made a transit stadia survey of the lands of Florence McDonald Allotment No. 560, Sec. 16, T. 19 N., R. 19

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

W., on November 7, 1914, and obtained the following data:

Owner	Description	Creek	Ditch	Head of Ditch	Acres Irrig.
Florence McDonald	SW $\frac{1}{4}$ NE $\frac{1}{4}$ & NW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 16-19-19	Post	McDonald	SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10-19-19	8.2

Description	Acres Irrig.	Possibly Irrigated	Unirrigated	Irrigable	Total Acres
SW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 16-19-19.....	6.3	0.0	33.7	Est 38	40.0
NW $\frac{1}{4}$ SE $\frac{1}{4}$ do	1.9	0.0	31.8	35	40.0
Totals.....	8.2	0.0	71.8	73	80.0

This allotment slopes toward the west. The soil is a light loam free from rocks. Water for irrigation is received from Post Creek through the McDonald ditch. There are no buildings on this allotment. It is used for pasture except 6.3 acres of hay in the north forty.

SW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., lies on land sloping to the west. A wide coulee runs through the central part from east to west. 6.3 acres of hay are irrigated from the McDonald ditch by allowing the water to flow down the coulee. Near the west boundary a new ditch takes out of the coulee and runs across the Mary C. McDonald allotment [512] to William Deschamps allotment. An old ditch crosses the northeast corner on a ridge but has not been used for some time. 11.9 acres might have been irrigated in the northwest corner at one time. 21.8 acres of pasture may receive a small amount of sub-irrigation from the main ditch.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

NW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., slopes to the west. The soil is a black loam comparatively free from rocks and brush except along the dry creek bed crossing from east to west through the center of this allotment. This forty contains 1.4 acres of irrigated orchard in the northwest corner and 0.5 acres of irrigated pasture near the west boundary. The remainder of the forty is good dry pasture.

Allotted Edward Deschamps Allotment No. 783
Post Creek Near St. Ignatius

I, R. W. Lincoln, Junior Engineer, U. S. Reclamation Service certify that I have been employed on the Flathead Indian Reservation on the survey of private lands from November 18, 1916 to December 6, 1916; that the allotment number and property ownership were taken from the official allotment plats prepared in 1910 under the direction of Fred C. Morgan, Superintendent and Special Disbursing Officer, Flathead Schools; that I made a transit stadia survey of the lands of Edward Deschamps Allotment No. 783, Sec. 17, T. 19 N., R. 19 W., on and obtained the following data:

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

Owner	Description	Creek	Ditch	Head of Ditch	Acres Irrigated
Edward Deschamps	E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 17-19-19	Post	McDonald	SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10-19-19	66.7 [513]

Description	Acres Irrig.	Possibly Irrigated	Unirri- gated	Irri- gable	Total Acres
SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 17-19-19.....	27.2	1.8	11.0	29.0	40.0
NW $\frac{1}{4}$ SW $\frac{1}{4}$ do	39.5	0.0	0.5	39.5	40.0
Totals.....	66.7	1.8	11.5	68.5	80.0

This allotment is watered from the Deschamps-McDonald ditch.

E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., slopes gently to the west. A flat coulee runs west across the eighty a little south of the center. The north part of this allotment has no signs of any ditch except a ridge that might have been a ditch before being plowed under. The allotment to the west has a flume crossing Mission B Canal. This probably carried a ditch that crosses this eighty. The allotment to the east has four traces of ditches which are quite distinct. There is a drain ditch south of the coulee which drains a swampy brush patch of 11.5 acres into Mission B. There is an orchard covering 0.8 acre in the southwest corner of the north forty. The garden of 0.2 acre is on the west side of the south forty. The house and barn lie to the north of it. Grain has been grown on 19.5 acres of the south forty in 1916. No irrigating was done during the year 1916 according to the son of Raddis, who is

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

living on the allotment. Mission B Canal will irrigate 6.9 acres of this allotment. If the land were cleared there would be about 10.0 acres more irrigable land.

Allotted Oro Deschamps

Allotment No. 784

Post Creek Near St. Ignatius

I, R. W. Lincoln, Junior Engineer, U. S. Reclamation Service certify that I have been employed on the Flathead Indian Reservation on the survey of private lands from November 18, 1916 to December 6, 1916; that the allotment number and property ownership were taken from the official allotment plats prepared in 1910 under the direction of Fred C. Morgan, Superintendent and Special Disbursing Officer, Flathead Schools; that I made a transit stadia survey of the lands of Oro Deschamps [514] Allotment No. 784, Sec. 17, T. 19 N., R. 19 W., on Post Creek and obtained the following data:

Owner	Description	Creek	Ditch	Head of Ditch	Acres Irrig.	
Oro Deschamps	W $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 17-19-19	Post	Deschamps-McDonald	SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10-19-19	69.5	
Description			Acres Irrig.	Possibly Irrigated	Unirrigated	Total Acres
SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 17-19-19.....			29.5	0.0	10.5	40.0
NW $\frac{1}{4}$ SE $\frac{1}{4}$ do			40.0	0.0	0.0	40.0
Totals.....			69.5	0.0	10.5	69.5
					69.5	40.0

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

This allotment is watered from the Deschamps-McDonald ditch. This ditch takes its water from Post Creek about one-quarter of a mile from Lake McDonald. Joseph Deschamps testified that the ditch had been constructed in 1904.

W $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., slopes gently to the west. There is a flat coulee that crosses the eighty a little south of the center. The upper part of the coulee is filled by 10.5 acres of swamp and brush. The reset of the coulee, 14.1 acres, is meadow land. The north 35.2 acres was sown to grain in 1916. This part was probably irrigated at one time but at the present there are no evidences of ditches except a flume over Mission B canal. The south 20.2 acres were also in grain in 1916. It has a well defined ditch which was not used during the past season. Mission B. Canal will irrigate approximately 66.2 acres of this allotment. If the land were cleared there would be about 5 acres more of irrigable land.

Allottee, William Deschamps. Allotment No. 781.

Post Creek Near St. Ignatius

I, R. W. Lincoln, Junior Engineer, U. S. Reclamation Service, certify that I have been employed on the Flathead Indian Reservation [515] on the survey of private lands from October 30, 1914, to November 30, 1914; that the allotment number and

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

property ownership were taken from the official allotment plats prepared in 1910 under the direction of Fred C. Morgan, Superintendent and Special Disbursing Officer, Flathead Schools; that I made a transit stadia survey of the lands of William Deschamps.

Allotment No. 781, Sec. 16 & 17, T. 19 N., R. 19 W., on November 7, 1914, and obtained the following data:

Owner	Description	Creek	Ditch	Head of Ditch	Acres Irrig.
William Deschamps	SW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 16 & SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 17-19-19	Post	Deschamps	SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10-19-19	11.1

Description	Acres Irrig.	Possibly Irrigated	Unirrigated	Irrigable	Total Acres
SW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 16-19-19.....	9.6	9.0	21.4	Est. 38	40.0
SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 17-19-19.....	1.5	0.0	38.5	30	40.0
Totals.....	11.1	9.0	59.9	68	80.0

According to the testimony of Joseph Deschamps the Deschamps-McDonald ditch from Post Creek was built in about 1906 and before the Magee ditch was constructed.

This allotment is rather rough with considerable rock. The water is obtained from the Deschamps-McDonald ditch from Post Creek. A new ditch through the center of the Mary McDonald allotment conveys the water to this allotment, the old ditch along the northern boundary being abandoned. From testimony and the appearance of the land

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

the orchard of 0.5 acres is all that was formerly irrigated. [516]

SW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., contains 9.6 acres of irrigated hay, 0.6 acres of orchard formerly irrigated; also 8.5 acres that possibly have been irrigated. The remainder of the forty is dry pasture.

SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., contains 1.5 acres of irrigated hay in the southeast corner. A deep coulee runs east and west through the southern part of the forty. 8.5 acres are dry pasture.

Allottee, Frank Fiddler. Allotment No. 785.

Post Creek Near St. Ignatius

I, R. W. Lincoln, Junior Engineer, U. S. Reclamation Service, certify that I have been employed on the Flathead Indian Reservation on the survey of private lands from November 18, 1916 to December 6, 1916; that the allotment number and property ownership were taken from the official allotment plats prepared in 1910 under the direction of Fred C. Morgan, Superintendent and Special Disbursing Officer, Flathead Schools; that I made a transit stadia survey of the lands of Frank Fiddler Allotment No. 785, Sec. 16, T. 19 N., R. 19 W., on Post Creek and obtained the following data:

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

Owner	Description	Creek	Ditch	Head of Ditch	Acres Irrigated	
Frank Fiddler	W1½SW¼ Sec. 16-19-19	Post	Deschamps- McDonald	SE¼NW¼NE¼ Sec. 10-19-19	41.1	
Description		Acres Irrig.	Possibly Irrigated	Unirri- gated	Irri- gable	Total Acres
NW¼SW¼	Sec. 16-19-19.....	23.7	0.0	16.3	Est 10	40.0
SW¼SW¼	do	17.4	2.0	20.6	38	40.0
Totals.....		41.1	2.0	36.9	48	80.0

[517]

This allotment slopes gently towards the west. The soil is largely black loam with few rocks. The water for this allotment is brought through the Deschamps-McDonald ditch. There are two laterals reachnig this eighty. There are also three short ditches running on to the north forty from the coulee. There are no buildings on the allotment. Apparently they have never received permission to use water from the ditch.

22.8 acres of the NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., are sown to grain while 0.9 acres are covered with irrigated timothy. The rest of the forty is covered with thick brush.

SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., has 34.0 acres of cleared land and 6.0 acres of brush in the northwest corner. Of the cleared land 17.4 acres were irrigated timothy plowed up and 14.6 acres of good dry timothy. The remaining 2.0 acres in the southeast corner are apparently irrigated by water coming down the coulee from the Deschamps ditch.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

Allottee Duncan McDonald. Allotment No. 561.

Post Creek Near St. Ignatius

I, R. W. Lincoln, Junior Engineer, U. S. Reclamation Service, certify that I have been employed on the Flathead Indian Reservation on the survey of private lands from October 30, 1914, to November 30, 1914; that the allotment number and property ownership were taken from the official allotment plats prepared in 1910 under the direction of Fred C. Morgan, Superintendent and Special Disbursing Officer, Flathead Schools; that I made a transit stadia survey of the lands of Duncan McDonald

Allotment No. 561, Sec. 16, T. 19 N., R. 19 W., on November 7, 1914, and obtained the following data:

Owner	Description	Creek	Ditch	Head of Ditch	Acres Irrig.
Duncan McDonald	E $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 16-19-19	Post	McDonald	SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10-19-19	1.6

[518]

Description	Acres Irrig.	Possibly Irrigated	Unirrigated	Irrigable	Total Acres
NE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 16-19-19.....	0.0	0.0	40.0	Est. 10	40.0
SE $\frac{1}{4}$ NE $\frac{1}{4}$ do	1.6	0.0	38.4	25	40.0
Totals.....	1.6	0.0	78.4	35	80.0

This allotment lies near the foot of the Mission Range on land sloping toward the west. The northern part of the allotment is covered with timber with a considerable amount of underbrush. The soil is a black loam comparatively free from rock.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

The Joseph McDonald ditch traverses the allotment with a branch leading to the old cabins on the Louie Head allotment.

NE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., is covered with timber and underbrush except a small meadow in the southwest corner surrounding the farm buildings. None of the forty is irrigated.

SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., slopes to the south and west and contains 1.6 acres of irrigated hay in the northwest corner near the farm buildings. The water in the McDonald ditch is used for domestic and stock purposes.

Allottee Mary C. McDonald. Allotment No. 559.

Post Creek Near St. Ignatius

I, R. W. Lincoln, Junior Engineer, U. S. Reclamation Service certify that I have been employed on the Flathead Indian Reservation on the survey of private lands from October 30, 1914, to November 30, 1914; that the allotment number and property ownership were taken from the official allotment plats prepared in 1910 under the direction of Fred C. Morgan, Superintendent and Special Disbursing Officer, Flathead Schools; that I made a transit stadia survey of the lands of Mary C. McDonald Allotment No. 559, Sec. 16, T. 19 N., R. 19 W., on November 7 and 9, 1914, and obtained the following data: [519]

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

Owner	Description	Creek	Ditch	Head of Ditch	Acres Irrig.
Mary C. McDonald	SE $\frac{1}{4}$ NW $\frac{1}{4}$ & NE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16-19-19	Post	McDonald-Deschamps	SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10-19-19	3.2

Description	Acres Irrig.	Possibly Irrigated	Unirrigated	Irrigable	Total Acres
SE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 16-19-19.....	0.8	0.0	39.2	Est 35	40.0
NE $\frac{1}{4}$ SW $\frac{1}{4}$ do	2.4	0.0	37.6	35	40.0
Totals.....	3.2	0.0	76.8	70	80.0

This allotment lies on ground gently sloping towards the west and south. Only a small area is irrigated and about 2/3 of the allotment is covered with brush. The irrigation water comes from the Joseph McDonald ditch. There are no buildings on this allotment.

SE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., has a narrow coulee running from east to west. There is 0.8 acre irrigated hay in this coulee near the eastern boundary, the remainder is dry. The area north of the coulee is dry pasture. That south of the coulee with the exception of 0.8 acre of irrigated hay is covered with brush.

NE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., is covered with brush with the exception of 2.9 acres, 2.4 acres of which are irrigated from Deschamps ditch.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

Allottee Caroline McKeever. Allotment No. 791.

Post Creek Near St. Ignatius

I, R. W. Lincoln, Junior Engineer, U. S. Reclamation Service certify that I have been employed on the Flathead Indian Reservation on the survey of private lands from October 30, 1914, to November 30, 1914; that the allotment number and property ownership were taken from the official allotment plats prepared in 1910 under the direction of Fred C. Morgan, Superintendent and Special Disbursing Officer, Flathead Schools; that I made a transit stadia survey of the lands of Caroline McKeever [520] Allotment No. 791, Sec. 21, T. 19 N., R. 19 W., on November 9, 1914, and obtained the following data:

Owner	Description	Creek	Ditch	Head of Ditch		Access Irrig.	
Caroline McKeever	N1½NW¼ Sec. 21-19-19	Post	Deschamps-McDonald	SE¼NW¼NE¼	Sec. 10-19-19	0.1	
Description			Acres Irrig.	Possibly Irrigated	Unirri-gated	Irri-gable	Total Acres
NW¼NW¼ Sec. 21-19-19.....			0.0	1.3	38.7	Est 38	40.0
NE¼NW¼ do			0.1	0.0	39.9	40	40.0
Totals.....			0.1	1.3	78.6	78	80.0

This allotment lies on ground sloping towards the west. The soil is a heavy loam with considerable rock. A ditch has been constructed to the center of this allotment and a very small patch of potatoes was found that had been irrigated.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

NW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 21 contains 1.3 acres of garden near the farm buildings that might have been irrigated. According to the testimony of Joseph Deschamps there were 2 or 4 acres irrigated that are at present irrigated from small streams that come down from the mountains. 38.7 acres of the allotment was grain stubble at time of survey.

NE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 21 contains 0.1 acre of irrigated potatoes near the east boundary. The remainder is dry pasture.

Allottee Emma M. Magee. Allotment No. 688.

Post Creek Near St. Ignatius

I, R. W. Lincoln, Junior Engineer, U. S. Reclamation Service certify that I have been employed on the Flathead Indian Reservation on the survey of private lands from October 30, 1914, to November 30, 1914; that the allotment number and property ownership were taken from the official allotment plats prepared in 1910 under the direction of Fred C. Morgan, Superintendent and Special Disbursing Officer, Flathead Schools; that I made a transit stadia survey of the lands of Emma M. Magee [521] Allotment No. 688, Sec. 18, T. 19 N., R. 19 W., on November 10, 1914, and obtained the following data:

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

Owner	Description	Creek	Ditch	Head of Ditch		Acres Irrig.
Emma M. Magee	E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 18-19-19	Post	Magee-Minesinger	SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$	Sec. 10-19-19	15.1
Description		Acres Irrig.	Possibly Irrigated	Unirrigated	Irrigable	Total Acres
NE $\frac{1}{4}$ SE $\frac{1}{4}$	Sec. 18-19-19.....	0.0	40.0	0.0	Est 40	40.0
SE $\frac{1}{4}$ SE $\frac{1}{4}$	do	15.1	20.0	4.9	40	40.0
Totals.....		15.1	60.0	4.9	80	80.0

A. D. Magee testified that this allotment was all irrigated a few years ago.

NE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 18, T. 19 N., R. 19 W., slopes to the southwest. The soil is a good black loam. It was all plowed up in the fall of 1914. It has not been irrigated for the past few years.

SE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 18, T. 19 N., R. 19 W., slopes to the southwest. 20.0 acres in the northwest part are plowing 1.6 acres in the southeast corner are used for a yard around the house where A. D. Magee lives. A hog yard in the southwest corner covers 1.3 acres. There are 2.0 acres in the road on the south and east sides. There are 15.1 acres of fairly good irrigated timothy.

Allottee John Minesinger. Allotment No. 690.

Post Creek Near St. Ignatius

I, R. W. Lincoln, Junior Engineer, U. S. Reclamation Service certify that I have been employed

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

on the Flathead Indian Reservation on the survey of private lands from October 30, 1914 to November 30, 1914, that the allotment number and property ownership were taken from the official allotment plats prepared in 1910 under the direction of Fred C. Morgan, Superintendent and Special Disbursing Officer, Flathead Schools; that I made a transit stadia survey of the lands of John Minesinger [522] Allotment No. 690, Sec. 17, T. 19 N., R. 19 W., on November 6, 1914 and obtained the following data:

Owner	Description	Creek	Ditch	Head of Ditch		Acres Irrig.	
John Minesinger	S½NW¼ Sec. 17-19-19	Post	Magee-Minesinger	SE¼NW¼NE¼ Sec. 10-19-19		67.8	
Description			Acres Irrig.	Possibly Irrigated	Unirrigated	Irri-gable	Total Acres
SE¼NW¼ Sec. 17-19-19.....			31.8	0.2	8.0	Est 39	40.0
SW¼NW¼ do			36.0	2.7	1.3	39	40.0
Totals.....			67.8	2.9	9.3	78	80.0

The Magee-Minesinger ditch crosses this allotment, which was all irrigated at one time, according to testimony. The history of the ditch is given in the report on the Julia Minesinger allotment.

SE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., slopes to the southwest. The soil is a good black loam. 6.0 acres in the northeast corner are corrals around the buildings. 0.2 acres in the northwest corner are plowing. 2.0 acres in the southeast corner lie south of the creek and never have been irrigated from the

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

private ditch. The remaining 31.8 acres are good irrigated timothy.

SW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., slopes to the southwest. 2.6 acres in the northwest corner and 0.1 acres in the northeast corner are plowing and probably have been irrigated. 1.3 acres on two small knolls near the northwest corner are dry. The remaining 36.0 acres are fairly good irrigated timothy.

Allottee Julia Minesinger. Allotment No. 691.

Post Creek Near St. Ignatius

I, R. W. Lincoln, Junior Engineer, U. S. Reclamation Service, certify that I have been employed on the Flathead Indian Reservation [523] on the survey of private lands from October 30, 1914, to November 30, 1914; that the allotment number and property ownership were taken from the official allotment plats prepared in 1910 under the direction of Fred C. Morgan, Superintendent and Special Disbursing Officer, Flathead Schools; that I made a transit stadia survey of the lands of Julia Minesinger

Allotment No. 691, Sec. 17, T. 19 N., R. 19 W., on November 6, 1914, and obtained the following data:

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

Owner	Description	Creek	Ditch	Head of Ditch		Acres Irrig.	
Julia Minesinger	N1/2NW1/4 Sec. 17-19-19	Post	Magee- Minesinger	SE1/4NW1/4NE1/4	Sec. 10-19-19		
Description			Acres Irrig.	Possibly Irrigated	Unirri- gated	Irri- gable	Total Acres
NE1/4NW1/4 Sec. 17-19-19.....			0.0	23.8	16.2	Est 40	40.0
NW1/4NW1/4 Sec. do			0.1	39.0	0.9	40	40.0
Totals.....			0.1	62.8	17.1	80	80.0

The Magee-Minesinger ditch takes out of Post Creek just below the Deschamps-McDonald ditch. It emerges from the timber on the west boundary near the center of Section 9. It was used to supply Just below this point, a small ditch runs to the right. It runs across a ridge into another coulee near the center of Sec. 9. It was used to supply water for the steam shovel when the Feeder Canal was under construction. The ditch follows along the bottom of the coulee to a point near the west line of Section 9. Here it turns to the right and follows along the ridge to the northeast corner of the Julia Minesinger allotment. Water is turned down the coulee to the Mission B Canal and runs through the sluiceway. The ditchrider stated that in this way they used much of the water from Mission B Canal.

A. D. Magee and John Minesinger built the ditch. Magee claims it was built in 1907 and 1908, while Minesinger claims it was built in 1906. The flume near the headgate was rated by using a float. [524] It was running full with a surface velocity of 1.5

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

feet per second. The area of cross-section was 2.5 sq. ft. which gives a discharge of 3.0 second feet for an average velocity of 1.2 feet per second.

According to the testimony taken by the Commission, all of the Julia Minesinger allotment was irrigated at one time but at the date of survey it was all plowed up except a corral in the southeast corner. It could all be irrigated.

NE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., slopes to the south. The soil is black loam free from rock. 1.6 acres in the northeast corner lie above the Mission B Canal. 14.6 acres in the southeast corner are grass land used mostly for a corral. 23.8 acres in the west part of is a plowed field, which probably has been irrigated.

NW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., slopes to the southwest. The soil is a fair black loam. 0.9 acres in the northwest corner were never irrigated. 0.1 acre along the south line was irrigated timothy in 1914. The remainder is plowed field which probably has been irrigated in former years.

Allottee James Waymach. Allotment No. 689.

Post Creek Near St. Ignatius

I, R. W. Lincoln, Junior Engineer, U. S. Reclamation Service, certify that I have been employed on the Flathead Indian Reservation on the survey

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

of private lands from October 30, 1914, to November 30, 1914; that the allotment number and property ownership were taken from the official allotment plats prepared in 1910 under the direction of Fred C. Morgan, Superintendent and Special Disbursing Officer, Flathead Schools; that I made a transit stadia survey of the lands of James Waymach

Allotment No. 689, Sec. 17, T. 19 N., R. 19 W., on November 6, 1914, and obtained the following data: [525]

Owner	Description	Creek	Ditch	Head of Ditch		Acres Irrig.	
James Waymach	W $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 17-19-19	Post	Magee-Minesinger	SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10-19-19		0.4	
Description			Acres Irrig.	Possibly Irrigated	Unirrigated	Irrigable	Total Acres
NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W.....			0.1	0.0	39.9	Est 39	40.0
SW $\frac{1}{4}$ SW $\frac{1}{4}$ do			0.3	0.0	39.7	39	40.0
Totals.....			0.4	0.0	79.6	78	80.0

[526]

Mr. Smith: The intervener has no cross examination.

Mr. Wallace: No cross examination.

The Court: Do you wish further exhibits produced?

Mr. Wallace: Yes, may it please the Court . . .

The Court: Well, if they are in the possession of the [215] government, they will be brought here

(Testimony of W. S. Hanna.)

at ten o'clock tomorrow morning; Mr. Hanna will then resume the stand for cross examination by the defendants.

Witness Excused.

HENRY GERHARZ

was called as a witness on behalf of the plaintiff and having been first duly sworn testified as follows:

Direct Examination

By Mr. Simmons:

Q. You may state your name?

A. Henry Gerharz.

Q. What position do you hold with the government?

A. I am the Project Engineer on the Wind River Project in Wyoming at the present time.

Q. Were you employed on the Flathead Irrigation Project previous to your present employment?

A. Yes, I was on the Flathead Project from November 1933 to June 1938.

Q. When you arrived at the Flathead Project to take that employment did you make an investigation of the Flathead Project system?

A. Yes, as soon as I arrived I began becoming familiar with the different physical aspects of the project, made many trips to the lands, and exam-

(Testimony of Henry Gerharz.)

ined the reservoirs and ditches, and found out about water rights and water quantities, supply, and everything of that kind.

Q. Did you come in contact with these so-called Secretarial private water rights? [216]

A. Yes I did; I found that the Secretary had appointed a committee to make a study of diversions and that the committee had made a report which the Secretary had approved, allowing certain water rights to certain lands under dual control; that is, the government had nothing more to do, or seemingly had nothing more to do about the quantities to be diverted and when they were diverted, and that my predecessor had at various times tried to control the amounts of water that were diverted but that he had not, seemingly, realized much success with the job, so I reported this entire matter to my superiors in Washington and asked them for specific instructions as to how to proceed in this matter.

Q. And when did you so report this matter to Washington?

A. I wrote a letter on May 8 and I had a reply dated June 8, 1934.

Q. I hand you plaintiff's offered exhibit 11 and will ask you if that is the—if that is a certified copy of the reply that you received to your letter from the Washington office?

A. Yes, this is the certified copy of the letter appointing me as water commissioner of the Flat-

(Testimony of Henry Gerharz.)

head Project, Flathead Reservation, and instructing me on how to proceed.

Q. And how were you instructed to proceed in the control and distribution of the waters of the Flathead Project? A. Shall I read it?

Q. Well, if you recall you may state it.

A. Well, this letter went on to state that I was supposed to apportion the water to these private divertees and also to apportion the water as between the private divertees and the government project, and that I was to be governed by the [217] findings of the committee, approved by the Secretary.

Q. That is, the findings of this committee of December—reeporing December 10, 1919?

A. Yes.

Q. Which has been introduced in evidence?

A. Yes; and if I found any interference with the distribution of the water I was to report it to the commissioner.

Mr. Simmons: We now offer Exhibit 11.

Mr. Smith: No objection.

Mr. Wallace: No objection.

The Court: Admitted without objection.

Plaintiff's Exhibit 11, the document referred to, was thereupon received in evidence without objection and is a part of the original exhibits on file in this case.

(Testimony of Henry Gerharz.)

PLAINTIFF'S EXHIBIT 11

June 8, 1934

Mr. Henry Gerharz,
Project Engineer.

Dear Mr. Gerharz:

Responding to your letter of May 8 referring to the appointment of a Water Commissioner to supervise the distribution of water flowing within the boundaries of the Flathead Reservation in Montana—

The report of the Commission appointed for the purpose of determining old water rights on the Flathead Indian Reservation in Montana, which was approved by the Department on November 25, 1921, included the following provision:

The Secretary of the Interior shall appoint the Engineer in charge of the Reclamation work on the Flathead Indian Reservation to act as Water Commissioner for the Flathead Indian Reservation, and it shall be the duty of said water commissioner to divide the water of the natural stream or streams among the several ditches taking water therefrom according to the prior right of each. Said water commissioner shall have authority to regulate the distribution of water among the various users under any particular ditch.

Pursuant thereto, the then Project Engineer, Mr. C. J. Moody, was specifically appointed under date

(Testimony of Henry Gerharz.)

of August 10, 1922 by the Department to act as Water Commissioner on this reservation.

As you state, the Commission itself was discontinued on August 7, 1929, but this did not discontinue the office of the Water Commissioner whose duties are to administer the approved findings of the Commission. [528]

In view of the fact that the Water Commissioner must effect the division of the waters of the reservation between private parties and also between them and the Government irrigation project, it is felt that the Project Engineer is in the best position to perform these duties. Your request to be relieved of the responsibilities in this connection is, therefore, denied and you are hereby specifically appointed as Water Commissioner to do the things contemplated by the Commission's report.

These private water right matters were involved in the so-called "Moody Cases". The Circuit Court of Appeals for the Ninth Circuit reversed the decree of the District Court and remanded the cases with directions to dismiss them for want of necessary parties, unless the plaintiffs, within a reasonable time amended their complaint so as to bring in such necessary parties. Subsequently, in mandamus proceedings the Circuit Court granted our petition for a writ of mandamus against the District Court from proceedings inconsistent with the order of the Circuit Court. Owing to the need to protect the several private water users and the

(Testimony of Henry Gerharz.)

Flathead project in the use of water, it is necessary that some one perform this work, and the Project Engineer is the logical person to perform these services.

In case of interference by the water users with the distribution of the water, you will present the facts to District Counsel Simmons for his consideration and action.

Sincerely yours,
(sgd) WILLIAM ZIMMERMAN, JR.,
Assistant Commissioner.

Approved: Jun 12, 1934

(sgd) OSCAR L. CHAPMAN
Assistant Secretary.

Copy to Supervising Engineer Hanna

Copy to District Counsel Simmons [529]

Q. Are you familiar with the private water rights of the defendants in this case?

A. Yes, I have been over their ditches and know the lands and been over the lands. I might say, in furtherance of my instructions, that naturally I kept some track of the diversions, and as water was—the water supply on the project was very scarce that year, I wrote a letter to certain of the defendants, dated December 18, 1934 . . .

Q. . . . Well before you go any further—what was the reason for your contacting the defendants in this case?

(Testimony of Henry Gerharz.)

A. Well they were diverting waters that either were natural flow from Post Creek or the waters that had been turned out of the McDonald Reservoir, and as I saw it, on account of the water being short, I decided that we ought to save as much of it as possible, and on December 18, 1934, I wrote [218] certain of the defendants telling them that we intended to save as much water in McDonald Lake as possible that year, and therefore we would like to cut down the amount of water that was being turned down the creek during the winter, and in that way save as much water as possible in the reservoir, and I asked them for their cooperation in the matter.

Q. And then what steps did you take to limit the diversion or to attempt to procure the defendants' consent to control their diversion?

A. Early in the season of 1935 I instructed their water master, Mr. Dexter, to establish gauging stations in each of these two ditches, the Magee-Minesinger and the McDonald-Deschamps, and to have these gauges read regularly, and then to have this information brought to his office and for him to calculate the amounts of water that was actually being diverted, and to report to me; then on . . .

Q. . . . Did you formally write the defendants, or notify them?

A. On June 6th or 1935 I had Mr. Sperry measure the streams, and on June 8th I notified . . .

Q. . . . Well did Mr. Sperry measure the streams?

(Testimony of Henry Gerharz.)

A. Mr. Sperry measured the streams and made tabulations of the amount of water he found.

Q. What amount of water were the defendants diverting from the McDonald-Deschamps and the Magee-Minesinger ditches on June 30, 1935, according to the measurements given to you by Mr. Sperry?

A. Mr. Sperry measured 10.2 second feet flowing down the McDonald-Deschamps and 17.6 second feet flowing down the Magee-Minesinger ditch, which was, of course, in excess of [219] what the Secretary had allocated for those streams, so I notified them of the measurements that had been made and quoted the decree of the acreage under each of their ditches, and that they were entitled to two acre feet there actually, and asked them to curtail their diversions.

Q. And on what date was that?

A. That was on June 8, 1935.

Q. Did you write them further, or notify them further?

A. On July 3 I received a letter from Mr. Dexter, the water master, stating that during June the McDonald-Deschamps had diverted an amount of 411.6 acre feet of water, and the Magee-Minesinger had diverted 642.8 acre feet during June, which of course was in excess of the total amount that the Secretary had allowed them for the entire season. So on July 12 I wrote the defendants and quoted the decree of the Secretary to them, telling them

(Testimony of Henry Gerharz.)

how many acres of land the Secretary had stated they were entitled to water rights for and the amount of water, and also quoting to them that each ditch under the Secretarial decree was required to have a suitable headgate at the point of diversion and also a measuring device as close to the headgate as possible, and asking them to install these devices by the first of August, and on August 5 I received a letter from the water master that these devices had not been constructed, so I wrote, in accordance with my instructions as water commissioner, I wrote the district counsel, telling him of the fact and asking him to take whatever steps might be necessary.

Q. During that irrigation season, Mr. Gerharz, did you have available enough storage and normal flow of water to adequately irrigate the lands under the government project? [220]

A. No, we were delivering something like a foot, a little over a foot of water, as I remember it.

Q. Was that enough water to adequately raise a successful crop?

A. That was not what we would call a normal water supply for the project up there.

Q. You could have used all the waters diverted, in excess of the amounts . . .

A. . . . Oh naturally, we could have used it very nicely, the amounts that were diverted by the private divertees.

(Testimony of Henry Gerharz.)

Q. Were any crop losses suffered, to your knowledge, because of your inadequate water supply during 1935?

A. Well of course that would be very difficult for me to say except as one finds in one season you will burn out, or something of that sort.

Q. It was a short water year however?

A. It was a very short year.

Q. Now did you have these measurements continued after the year 1935?

A. I requested the water master to continue the measurements during the years 1936 and 1937, and until I left the project.

Q. And during the years 1936 and 1937 did the measurements show any increase or decrease over the amounts diverted in 1935?

A. Well I don't happen to have the records here but my memory is they increased.

Q. During those years 1936 and 1937?

A. Yes.

Mr. Smith: We have no cross examination.

[221]

Cross Examination

By Mr. Wallace:

Q. Mr. Gerharz do you know whether or not the amount of water that the defendants diverted through those ditches was actually used by them on the land occupied by them, respectively?

A. You mean whether they pro rated among themselves?

(Testimony of Henry Gerharz.)

Q. No I don't mean that, I meant, they used this water on their respective lands, so far as you know?

A. Well they either used or wasted it, I couldn't tell as to that.

Q. That's what I'm getting at; was there any contention, and is there any contention on your part at this time, that any of these defendants wasted any water?

A. Of course that is a long time ago, it would be hard for me to remember, but if the water users under the project used one foot and the water users under these two private ditches used six or seven or eight feet, why either they were not using the water to very good advantage, or they were wasting it.

Q. Well you already said that one acre foot was not nearly enough water, didn't you?

A. I haven't said nearly enough, I said it wasn't an adequate supply; I would say you would have to increase that.

Q. Well do you know whether or not the defendants used all of the water that they diverted beneficially on their lands occupied by them, or whether they wasted water?

A. Well my answer would have to be no, that I don't know, by going out there and seeing and having the direct knowledge at the present time, but from my experience I would [222] say they wasted it.

(Testimony of Henry Gerharz.)

Q. But that is only from your experience and not from actual knowledge?

A. I wouldn't remember, no, of ever having gone out there and seen them wasting it.

Witness Excused

C. H. DEXTER

was called as a witness on behalf of the plaintiff and having been first duly sworn testified as follows:

Direct Examination

By Mr. Simmons:

Q. State your name? A. C. H. Dexter.

Q. What is your position?

A. Watermaster at Post subdivision.

Q. How long have you been Watermaster of the Post subdivision? A. Since 1914.

Q. And that subdivision is located near the lands of the defendants in this law suit?

A. The north side of Post Creek.

Q. Well you are of course familiar with the lands of all the defendants here?

A. I am not—I could find them on the map, but I am not familiar with them.

A. In 1935, were you water master of the Post subdivision then? A. Yes. [223]

Q. Were you instructed by the project engineer to have made water measurements of the diversions

(Testimony of C. H. Dexter.)

of the defendants from the Magee-Minesinger and McDonald-Deschamps ditches? A. Yes sir.

Q. Will you state when you started having these measurements made during the irrigation season of 1935?

A. I think it was June 6, the first measurement was made, of 1935.

Q. How were these measurements made?

A. By the use of a current meter.

Q. Will you explain the use of the current meter and state what was done by you in connection with these measurements?

A. Well Mr. Sperry made the measurements; I don't remember whether I was with him on that occasion or not.

Q. That was with the current meter?

A. Yes.

Q. Now will you explain a current meter, how it is used and what its purpose is?

A. Well a current meter is an instrument to measure water; I think it has five cups on it, rotating on an axis; it runs free in the water, and it probably has been tested against a weir or dam, I suppose, some place, to determine how fast it runs; I am not familiar with all parts of it.

Q. Well that gives the rate of the flow?

A. That gives the rate of the flow.

Q. And did you have a gauge placed in the stream at the point of measurement?

(Testimony of C. H. Dexter.)

A. Yes, at the point of measurement there is a foot gauge or maybe a foot and a half or two feet, whatever the depth of the water it is placed at, a cross depth in area is taken [224] of the stream and probable depth taken every two feet across the stream to get the average depth of the stream, and the current meter is used in between each one of these to get the velocity of it, and the area is figured by the width—the depth—and when this area has been computed you add up the inches for that amount of gauge height; and in reading the stream they generally start out with a small amount of water, say a couple of second foot as a start, and read it there, and then raise the stream, and then read it again, and each day the gauge is read.

Q. Then you can compute from the gauge readings the amount of water diverted that day?

A. Yes.

Q. Now did you have gauges placed in the two ditches, in the McDonald-Deschamps and the Magee-Minesinger ditches? A. We did.

Q. And where in the ditches did you have those gauges placed?

A. Well the gauge in the Deschamps-McDonald ditch was about 66 feet—no, about 80 feet below the headgate, the present headgate that is in there now, and in the Magee-Minesinger—

Q. —And that gauge was above all the diversions of the defendants on that ditch? A. Oh yes.

Q. Go ahead?

(Testimony of C. H. Dexter.)

A. And the gauge in the Magee-Minesinger ditch—could I refer to a note on that?

Q. To refresh your recollection, yes. That note was made by you at the time?

A. The gauge in the Magee-Minesinger Ditch is 289 feet [225] below the turnout.

Q. That is above all these points of diversion of these defendants under that ditch? A. Yes.

Q. Now Mr. Dexter were separate gauge readings taken on each of these ditches during June, July, August and September of 1935?

A. Well there may have been a day or two along that they were not taken, but practically every day.

Q. Now when you say there was a day or two they were not taken, what did you do in regard to estimating the water diverted that day?

A. Well we would generally—I think our procedure was to take the day previous reading and putting it down, and a great many stations or times it showed exactly the same reading from one day to the next.

Q. That is common practice? A. Yes.

Q. With people who measure water, in the United States Geological Survey, to your knowledge. A. Yes.

Q. And it is a fairly accurate method of calculating the amount diverted when you have the amount calculated for the majority of days?

A. Yes.

(Testimony of C. H. Dexter.)

Q. Did you take all of these readings?

A. Oh no.

Q. Who took them?

A. Well my ditch riders probably took some of them, part of them. [226]

Q. And you took some of them?

A. And I took some of them.

Q. And how were they accumulated—how were they reported?

A. Well I had a book in the office and when they came in at night we always put the gauge readings in that book of whoever read it, and measured it, and then read it.

Q. Did you have the ditch rider reduce the gauge readings—I mean estimate the amount of acre feet diverted each day, from the gauge readings?

A. Not each day, but at the end of the month I used to total them up.

Q. Do you have that book here?

A. I have the book of the gauge readings, yes.

Q. And that is the book that has been in your possession—it is an official project record book kept by you? A. Yes.

Q. And you were acting under the directions of the project engineer? A. Yes.

Q. Can you tell me how much water was diverted by the defendants under the Magee-Mine-singer Ditch for the months of June, July, August

(Testimony of C. H. Dexter.)

and September, 1935, according to the calculations in your book and the computations made by you?

A. I only have the gauge readings in here; the computations are in the project office, I think Mr. Sperry has them.

Q. You have the gauge readings? A. Yes.

Q. Have you computed those gauge readings yourself? A. Yes.

Mr. Simmons: Well can we have a few minutes adjournment— [227] you say the totals are in the hands of Mr. Sperry?

The Court: Yes, we will adjourn until ten o'clock tomorrow morning; it is five o'clock.

Whereupon at five o'clock p. m. of said day adjournment was had until ten o'clock the following morning, May 7, 1940, at which time the trial was resumed, with the witness Dexter resuming the witness stand.

The Court: Proceed.

Q. Mr. Dexter you now have the totals of the amounts of water in acre feet? A. I do.

Q. Diverted by the defendants from the Magee-Minesinger Ditch? A. I do.

Q. During June, July, August and September of 1935? A. Yes.

Q. Will you read these totals by the month, first through the Magee-Minesinger Ditch?

A. June 1935, 689.01.

Q. Acre feet? A. Acre feet.

Q. During July?

(Testimony of C. H. Dexter.)

A. July, 683.65; August, 596.01; September, 212.23.

Q. Now have you totaled those figures for those four months, and if so will you read the totals?

A. Total, 2180.90.

Q. Now Mr. Dexter will you refer to your figures for the diversions made by the defendants from the McDonald-Deschamps Ditch during June, July, August and September of 1935?

A. June 1935, 421.66; July, 356.20; August, 188.41; [228] September, 85.64.

Q. And the total for those four shows?

A. 1051.91.

Q. And those figures are all in acre feet of water diverted? A. Yes.

Q. Mr. Dexter following the year 1935 did you make similar measurements during 1936, 1937, 1938 and 1939? A. We did.

Q. And did you following the same procedure as you have testified to? A. Yes.

Q. Relative to the year 1935? A. Yes.

Q. Do you have in your record, in the official water record book kept by you under the direction of the project engineer the amounts diverted by the defendants during—through the McDonald-Deschamps Ditch—during the months of June, July, August and September of 1936? A. Yes.

Q. Will you read those figures?

A. June 1936, 352.63; July, 392.29; August, 218.18; September, 68.64.

(Testimony of C. H. Dexter.)

Q. And the total? A. 1031.74.

Q. Do you have the figures for the amounts diverted during 1936 for those defendants through the Magee-Minesinger Ditch, and if so, just read them?

A. June, 674.37; July, 956.97; August, 588.06; September, 261.75.

Q. And the total? [229]

A. Season, 2481.15.

Q. Now for the year 1937 if you will read them from the McDonald-Deschamps Ditch?

A. 1937, McDonald-Deschamps: June, 345.51; July, 343.93; August, 376.40; September, 188.10.

Q. And the total?

A. Season, 1253.94.

Q. Now from the Magee-Minesinger Ditch for the year 1937?

A. June, 519.75; July, 803.68; August, 495.99; September, 336.60; season, 2156.02.

Q. Through the McDonald-Deschamps Ditch for the year 1938?

A. June, 467.95; July 453.91; August 336.50; September, 231.96; season, 1490.32.

Q. From Magee-Minesinger Ditch for 1938?

A. June, 707.65; July, 831.40; August, 533.02; September, 483.09.

Q. For the year 1939 from McDonald-Deschamps Ditch—or the total, pardon? A. 2558.16.

Q. Now from McDonald-Deschamps Ditch for the year 1939?

(Testimony of C. H. Dexter.)

A. June, 229.28; July, 488.66; August, 447.68; September, 291.65; season, 1457.27.

Q. From the Magee-Minesinger for the year 1939?

A. June, 187.70; July, 817.54; August, 460.55; September, 308.88; total, 1774.67.

Q. Was the method used in measuring these waters and in computing the amount in acre feet diverted by the defendants during those years 1935 to 1939 inclusive, a standard method of measurement universally adopted and used by the United States Geological Survey and of the Bureau of Recla- [230] mation? A. Yes sir.

Q. You testified as to the diversions made, in acre feet, by the defendants, from these ditches, during five months of the irrigation season; do you know whether or not they diverted any waters in other diversions during the year, outside of the irrigation season, from these ditches?

A. Yes sir.

Q. Did you make any accurate measurements of those diversions?

A. Well we estimated the amount of water and kept track of them; sometimes it was below our gauge readings.

Q. There was water, however, diverted during other months? A. Yes.

Q. Could that water have been impounded in government storage projects and used on project

(Testimony of C. H. Dexter.)

lands had the defendants not diverted other waters?

A. Yes sir.

Q. You are familiar, of course, with crop conditions and with the lands in general in your Post Creek subdivision?

A. Yes sir.

Q. About how many acres were irrigated in the Post subdivision of the Flathead Irrigation Project in 1935?

A. About 18,568.

Q. Did you have an adequate water supply, including your storage?

A. No sir.

Q. To adequately irrigate those lands during 1935?

A. No sir.

Q. Do you know the amount of water, approximately, that [231] each acre under the project, under the Post Subdivision of the Flathead Project, received during the year 1935?

A. Yes sir.

Q. And how much was it, actually delivered on the lands?

A. .92 of an acre foot.

Q. What effect did this water shortage have upon the lands under the Post Subdivision of the Flathead Project during 1935?

A. Well it had a tendency for each farmer to cut down his acres in his farm, so that what waters he had he could put more on crops that was more profitable than some others. And in a great many cases they didn't irrigate the alfalfa later in the season because of the shortage of water and saving the water for their beets, and if they had beets, potatoes, clover seed, and such crops in then, and

(Testimony of C. H. Dexter.)

they were running a shortage of water, it cut down their income and made it pretty hard for them to pay their o. and m. charges, and handle their operations.

Q. That is, the operation and maintenance charges? A. Yes sir.

Q. Now if the defendants had confined their diversions to the amounts of water allocated by the Secretary, and those waters used in excess had been controlled—in excess by the defendants—had been controlled, what effect would that have had upon the crops in your subdivision, in the Post Subdivision, on the Flathead?

A. Well any time you got more water why you got more crops, and it helps them out that much.

Mr. Smith: No cross examination.

Cross Examination

By Mr. Wallace: [232]

Q. You only had the one meter gauge in each of those two ditches that you testified to?

A. They were both read by the same meter.

Q. And they were not near the head of the ditch? A. Very close.

Q. Of course there was considerable loss of water by seepage and evaporation before this water in these ditches reached the land of the defendants after it passed your measuring device?

A. I am not familiar with that at all, I don't know whether there was or not.

(Testimony of C. H. Dexter.)

Q. Approximately how long is the McDonald-Deschamps Ditch from the time it leaves Post Creek until it reaches some of the lands of the defendants?

A. Why you might look on the map which would tell you, but outside of that, I don't know.

Q. Just approximately?

A. I judge probably two miles.

Q. And the Magee-Minesinger Ditch, it is, just approximately, how long, from the time it leaves the Post Creek until it reaches the Minesinger land?

A. Well I misunderstood your first question; the Magee-Minesinger Ditch probably is two miles, and the McDonald-Deschamps Ditch is less than that, I think.

Q. And do you know whether there is any loss of water by seepage from Post Creek on the defendants lands, or not?

A. Well I rather suppose there is, in the McDonald-Deschamps Ditch, on the Wald ditch—I don't think there is on the Magee-Minesinger, I don't think there is so much.

Q. In your experience as an engineer and water-master you [233] would say there is a loss of water, isn't there?

A. I think there is a loss of water but as to the amount I have no idea.

Q. But there is a loss of water in that ditch isn't there, both in evaporation and seepage?

A. Oh yes.

(Testimony of C. H. Dexter.)

Q. Now on the lands of the defendants, do you know where they are located, approximately?

A. I can't say that I do.

Q. Well you know approximately, don't you, Mr. Dexter?

A. Well they are on the south of the McDonald Lake and in the Mission Division, but where they are I don't know.

Q. And south of Post Creek? A. Yes.

Q. Well does your jurisdiction as water master extend over the territory in the vicinity of where these lands are located? A. It does not.

Q. Your jurisdiction goes—as water master—goes down to Post Creek?

A. To Post Creek on the north side.

Q. And it was your ditch riders that measured the ditches—measured the waters in the defendants' ditches?

A. My ditch riders merely read the gauges.

Q. There is a water master over the territory in the vicinity of where the defendants lands are located, isn't there? A. Yes.

Q. And Mr. Montjoy? A. Yes. [234]

Q. And he has ditch riders?

A. And he has ditch riders.

Q. Will you explain to us, please, how it came that your ditch riders measured these waters in these ditches, out of your territory?

A. Well I have taken care of all the waters in Post Creek—that is, our water runs north—I take

(Testimony of C. H. Dexter.)

care of the waters in Post Creek and I also take care of the water that is diverted from Post Creek between the Pablo Feeder and McDonald Lake, but as far as the land is concerned, I have nothing to do with the land whatsoever.

Q. Now most of these gauge readings were taken by ditch riders; not by yourself?

A. A great many of them were taken by myself and some by the ditch riders.

Q. Well let me ask you this, if you know, most all of the defendants lands, with the exception of the Alexander tracts, are located west and below the Pablo Feeder Canal? A. Yes.

Q. And most of the lands, or all of the lands of the defendants on the McDonald-Deschamps Ditch, except the Alexander tract, is located east, or above the Pablo Feed Canal? A. Yes sir.

Q. So that if these defendants used an excess of water on their lands this water that was in excess would be picked up in the Lateral B, government canal below, wouldn't it? A. Yes.

Q. And now as to the lands of Mr. Wald, those lands lie—in other words, Lateral C Canal goes through those lands, doesn't it? [235]

A. I think it does.

Q. So that if he were wasting much water, or using water in excess, part of that water or all of it would be picked up in the Lateral C Canal, wouldn't it? A. Yes.

(Testimony of C. H. Dexter.)

Q. When you were speaking of the Post Subdivision and the irrigation in 1935, just where is the Post Subdivision?

A. Well the Post Subdivision is that part of the Flathead Project that lies north of Post Creek and Mission Creek and south of Crow Creek, and the Pablo Feeder Canal on the east and the Flathead River on the west.

Q. I am interested in knowing if there is any part of the Post Subdivision south of Post Creek?

A. There is not.

Q. It is all north of Post Creek?

A. It is all north of Post Creek and south of Crow Creek.

Q. And were these gauge readings during the months of June, July, August, of the years you have testified to, taken daily?

A. Well practically; there may have been a few Sundays they were missed, or sometimes in the middle of the week, but generally every day.

Q. Were there any times that you took the readings yourself that you found the water shut down to a very small quantity?

A. Oh yes,—and it was so recorded.

Cross Examination

By Mr. Smith:

Q. Mr. Dexter, with reference to the waste of water by usage of surplus amounts on the lands, do you have some waste within the subsoil?

(Testimony of C. H. Dexter.)

A. I presume there is. [236]

Q. And if waste went into the subsoil by reason of the use of the excess amount that would not be picked up in either Lateral B, under the McDonald-Deschamps Ditch, or in Extension C, under the Magee-Minesinger Ditch, would it?

A. I don't think it would; I don't know the character of that soil but I don't suppose it would.

The Court: You had better qualify your witness; it appears on the record that he has been talking about something that he doesn't know a thing about.

Mr. Smith: It is going to be rather difficult to qualify him as to what he has said.

The Court: Well if you can't qualify him put on a witness that can qualify it; this is encumbering the record with words that mean nothing.

Redirect Examination

By Mr. Simmons:

Q. You testified that certain of this excess water diverted by the defendants empties into Lateral B, and is picked up by the government canal; isn't it a fact—or is it a fact—that there is, or is not, much land upon which the government can use that water below Lateral B after it is picked up?

A. Well it is so intermittent that it doesn't do them any good.

(Testimony of C. H. Dexter.)

Recross Examination

By Mr. Wallace:

Q. Do you recall when it was that the turnout was constructed in the Pablo Feeder Canal, in which parts of the lands of the defendants may now be irrigated from government work?

A. In the Pablo Feeder Canal? [237]

Q. Yes. A. I do not.

Witness Excused.

Mr. Simmons: We have no more witnesses, your Honor. I would like to offer in evidence at this time plaintiff's offered exhibit number 1, being the large map, and Plaintiff's Exhibit number 4, the project map to the left of the large map, and Plaintiff's Exhibit number 5, the certified copy of the report to Congress, showing the cost of the Flathead Project, June 31, 1935.

Mr. Wallace: We have no objection.

Mr. Smith: We have none.

The Court: Very well, these exhibits will be admitted without objection.

Plaintiff's Exhibit 1, the large map referred to, was then received in evidence without objection, and is on file with the original exhibits in the case.

Plaintiff's Exhibit 4, the project map referred to, was then received in evidence without objec-

(Testimony of C. H. Dexter.)

tion and is a part of the original exhibits in the case.

Plaintiff's Exhibit 5, the certified copy referred to, was then received in evidence without objection and is a part of the original exhibits in this case.

PLAINTIFF'S EXHIBIT 5.

Irrigation

10162-32

Dec. 21 1935

The President of the Senate.

Sir:

Pursuant to the provisions of the Acts of April 4, 1910 (36 Stat. 270) and August 1, 1914 (38 Stat., 583), I am submitting herewith three tables representing the cost, cancellations, and other data with respect to Indian irrigation projects as compiled to the end of the fiscal year June 30, 1935.

Sincerely yours,

(sgd) HAROLD L. ICKES,

Secretary of the Interior.

Enclosure 254323

(Testimony of C. H. Dexter.)

Irrigation

10162-32

Dec. 32, 1935

The Speaker of the House of Representatives.

Sir:

Pursuant to the provisions of the Acts of April 4, 1910 (36 Stat., 270) and August 1, 1914 (38 Stat., 583), I am submitting herewith three tables representing the cost, cancellations and other data with respect to Indian irrigation projects as compiled to the end of the fiscal year June 30, 1935.

Sincerely yours,

(sgd) HAROLD L. ICKES,

Secretary of the Interior.

Enclosure 254324



(Testimony of C. H. Dexter.)

Mr. Simmons: I may advise the Court that at this time it has been suggested and offered to the Court that the plaintiff does not care to offer any evidence as to the duty [238] of water on the lands of the defendants, for the reason that our evidence as presented to the Court shows that there is not sufficient water to deliver over an acre foot of water in the Post Creek Subdivision; for the further reason that unless it is shown that the burden is on the defendants that the Secretary made an unjust and unequal division of water, in allocating two acre feet, why this is not the time for us to offer such proof; consequently the plaintiff now rests.

The Court: Mr. Wallace I believe there was a witness to be recalled here at ten this morning on some matter you wished to go into.

Mr. Wallace: Mr. Hanna was the witness.

The Court: Do you wish him to resume the stand, so you may examine further?

Mr. Wallace: If I may.

The Court: Very well, Mr. Hanna.

And thereupon

W. S. HANNA,

a witness for the plaintiff, resumed the witness stand, and testified as follows:

Cross Examination

By Mr. Wallace:

Q. Now I show you the Defendants' proposed exhibit 12, and I will ask you what that is, please?

A. This appears to be a certified copy of a letter addressed to the Commissioner of Indian Affairs by the committee appointed to investigate the private water rights. It reads: "It is believed to be a just and correct measure of private water rights, and having already received Department approval, [239] is made the basis for the findings in the cases covered by this report. It is recommended that the findings in the nineteen cases covered by this report be approved."

Q. And there is attached to the report one tract of land? A. Yes.

Q. Of Oro Deschamps, number 734; do you know whether that is one of the tracts of land involved in this action, or not?

A. Yes it is one of the tracts involved.

Witness Excused.

Plaintiff Rests.

The Court: Which wishes to proceed now, the defendants or the interveners?

Mr. Wallace: I think it is proper that the interveners should proceed now.

The Court: I think so; he is the moving party at this stage of the case.

Mr. Smith: Yes I think that is true, your Honor.

And thereupon the following evidence was introduced by the interveners in behalf of their case in chief:

Mr. Smith: I now ask the Court to take judicial notice of a report—an excerpt from the Seventh Annual Report of the Reclamation Service, 1908, at pages 100 and 101, of the Seventh Report. I have available for the information of the Court that report, and because the books are books from the University Library I have had an excerpt copied from the material therein contained, for the information of [240] the Court, if that is satisfactory.

The Court: Any objection on the part of any of the other parties?

Mr. Simmons: No objection.

Mr. Wallace: No objection.

The Court: Better have the excerpt marked.

(Identified by the clerk as Intervenors Exhibit 13)

The Court: Has that exhibit been made available to opposing counsel?

Mr. Smith: No it hasn't.

The Court: Well the Court does not care to deal with an excerpt from a record without the record itself being submitted to counsel.

Mr. Smith: Well we will submit the record to counsel.

The Court: So that they may have an opportunity to submit other parts, if they wish.

Mr. Smith: We will make these available to counsel. I now offer in evidence Interveners' Exhibit 14, the same being a certified copy of the order creating the Flathead Irrigation District.

Mr. Simmons: No objection.

Mr. Wallace: No objection.

Mr. Smith: And I particularly refer the Court to page 16 of the exhibit wherein it shows the inclusion of the lands of the intervener, Dennis A. Dellwo, in the district; and in this connection I should like to ask the Court to take judicial notice of Section 7166 to Section 7169, inclusive, of the Revised Codes of Montana, 1921, and the Acts amendatory thereto.

The Court: Revised Codes of Montana '21 or '35? [241]

Mr. Smith: '21.

The Court: Exhibit number 14 will be considered read in evidence; any party will have the right to refer to and comment upon the same or any part of it, at any time during the trial and in briefing.

Interveners' Exhibits 13 & 14 are on file with the original exhibits in this case.

INTERVENERS' EXHIBIT 14.

Exhibit No. 14 is a duly certified copy of the order of the District Court of the Fourth Judicial District of the State of Montana, creating the Flathead Irrigation District as a public corporation under the laws of the State of Montana, describing the lands within the boundaries of the district, which are all within the Flathead Indian Reservation and the Flathead Irrigation Project, and including among others the lands of the intervenor Dellwo as described in the complaint in intervention.

Mr. Smith: I now offer in evidence Interveners' Exhibit 15, the same being a certified copy of the original Repayment Contract between the United States and the Flathead Irrigation District, and also a contract supplemental to the original contract.

The Court: Is there any objection?

Mr. Simmons: No objection.

Mr. Wallace: No objection.

The Court: In evidence without objection.

Interveners Exhibit 15, the document referred to, was thereupon received in evidence without objection, being a part of the original exhibits in this case.

INTERVENERS' EXHIBIT 15

Exhibit No. 15 is a duly certified copy of the original and supplemental repayment contracts between the United States and the Flathead Irrigation District, under which contracts the Flathead Irrigation District binds itself and the lands within the district to repay to the United States the proportionate share of the cost of the construction and operation and maintenance. The District binds itself to use its taxing power to collect the charges from time to time assessed by the United States. The title to the project is stipulated to remain in the United States until the construction charges are paid.

Mr. Smith: May this be received subject to the same ruling?

The Court: It may be considered read and used in the same way as Exhibit 14.

Mr. Smith: I now offer in evidence Interveners Exhibit 16, the same being a certified copy of the patent from the United States to Margarita Gariepy; a deed from Margarita Gariepy to F. L. Gray Company; a certified copy of a deed from F. L. Gray Company to Frank L. Gray; a deed—or certified copy of a deed from Frank L. Gray to C. D. [242] Thompson; and a certified copy of a deed from Charles D. Thompson and wife to Dennis A. Dellwo, all of which deeds cover the E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 26, Township 20 North, Range 21 West.

Mr. Simmons: No objection.

Mr. Wallace: No objection.

Mr. Smith: It is a chain of title to the lands of the intervenor Dellwo.

The Court: It will be admitted without objection, considered as read, and can be used as Exhibit 14 can be used.

Interveners Exhibit 16, the certified copies referred to, was then received in evidence without objection, and is a part of the original exhibits in the case.

INTERVENERS' EXHIBIT 16

Exhibit No. 16 consists of a patent and several deeds. The patent is for the East Half of the Southwest Quarter of Section Twenty-six, Township 20 North, Range 21 West, M. M., and was issued to a Flathead Indian. The deeds operate to transfer the title to the land described to the intervenor Dellwo in fee simple. [550]

Mr. Smith: I now offer in evidence Interveners' Exhibit 17, the same being a certified copy of the Rules and Regulations adopted for the Operation and Maintenance of the Flathead Irrigation Project.

Mr. Simmons: No objection.

Mr. Wallace: No objection.

The Court: It will be admitted subject to the same conditions as 14, 15 and 16.

Intervenors Exhibit 17 was then received in evidence without objection and is a part of the original exhibits in the case.

INTERVENERS' EXHIBIT 17.

Exhibit 17 contains the rules promulgated by the Secretary of the Interior for the management of the Flathead Irrigation Project, August 1, 1932, as amended July 8, 1933. The rules in part are as follows——

1. Organization——

Indian irrigation projects are in charge of a Project Engineer or other appointed employee of the U. S. Indian Service who is fully authorized to administer, carry out and enforce these rules and regulations, either directly or through project employees delegated by him, such as watermasters, ditchriders, foremen or other assistants. The Project Engineer or his representative is fully authorized to refuse or discontinue delivery of water to any person who disregards these rules and regulations.

2. Irrigation Season——

The irrigation season for the Flathead irrigation project covers the period from April 15 to October 15. In the event of unusual conditions in the spring, owing to construction or maintenance work on canals or laterals or when the designated opening date appears detrimental to crop production, the proper officers of the

United States are authorized to advance or delay, for a period of fifteen days, the beginning of the season's operation, and a corresponding change may be made for the date of closing the season, if it is to the best interests of the project or the farmers so to do. In no event, however, shall the canals be operated during any one season for a period in excess of six months.

* * * * *

5. Delivery Point.

The general rule of the project shall be one delivery point at the upper boundary of the farm unit or allotment, and the project shall maintain the lateral system to that extent. In special cases where from a cost or topographic standpoint it is impracticable for the landowner or lessee to irrigate the entire irrigable area of his tract from one delivery point, the Project Engineer is authorized to establish additional delivery points but in no instance shall more than one delivery point be established and maintained when the landowner or lessee can at a reasonable expense provide for delivery by the construction of suitable head ditches. [551]

6. Record of Deliveries.

Water users who are entitled to the delivery of water shall file with the ditchrider, or other proper operation employee, forty-eight hours in advance of the time delivery is desired, a

properly signed water request card on which is indicated the time delivery is desired, the description of the subdivision, area to be irrigated, and the turnouts to be used. Printed Water Request Cards will be supplied by the project. Request cards are required for each irrigation, and upon completion of a delivery the water user shall acknowledge same by signing the water request card. Ditchriders are specifically prohibited from making water delivery to any water user until he (the ditchrider) receives notice from the project office that all charges have been paid and proper water request cards have been filed by the water user. Water request cards for all completed deliveries must be filed in the project office at the end of each month during the irrigation season, and he must also file a statement of all uncompleted deliveries with the estimated acreage irrigated under such requests to the end of the month.

7. Duty of Water; Delivery in Periods of Shortage.

Payment of the annual operation and maintenance assessments shall entitle a water user to the delivery of water, without further charge, up to the maximum number of acre feet specified in the annual assessment notice for each acre of irrigable land in the farm unit or allotment. Water will be delivered, subject to the

provisions of these regulations, on a demand basis so long as a sufficient quantity is available for project use. Where the exigencies, however, justify, the Project Engineer is authorized to adopt a rotation system, either for the entire project or for individual units thereof, when, in his opinion, such action is for the best interests of the project in the apportionment to each water user of his just proportionate share of the available water supply.

At any time during the irrigation season when it shall appear, in the judgment of the Project Engineer, that there shall not be sufficient water available to deliver the maximum amount, as provided for in the annual assessment notice, to the entire irrigable area for which application for delivery of water has been made and approved, then the Project Engineer shall be authorized to reduce such amount to the extent that there shall, in his judgment, be sufficient water available to make proportionate delivery to each unit or allotment; and when any unit or allotment shall have had delivered to it the amount so fixed, it shall not be entitled to further delivery of water except when it shall appear that there is a surplus of water available. [552]

It is the duty of the Indian Irrigation Service to furnish water for beneficial irrigation use only, and it is the duty of the water user to assist in the prevention of waste, and also pre-

vent damage to adjacent lands. Water users are responsible for water after it is delivered to their land, and they are required to have their field ditches in suitable condition and of such capacity as to permit the use of economical heads.

8. Waste Water——

Water users will be required to construct and maintain in good order and repair upon their lands, such ditches as may be necessary to catch and conduct to some waste canal, ditch or natural drainage channel, all waste water flowing upon or from their lands. No waste water shall be allowed to flow upon a road or highway right of way, and no waste water will be allowed to collect within twenty feet of any canal or lateral belonging to the United States, nor shall any waste water ditches be constructed within ten feet of any canal or lateral, except at points of intersection or crossing, and such crossing shall be located and constructed only by order and under the direction of the proper employee of the United States. Water delivery will be refused any water user during such time as he fails or refuses to comply with the provisions of this paragraph.

9. Structures——

The necessary headgates, checks and measuring devices will be installed by the project in canals, laterals and drainage ways operated and

maintained by the project. Any person or corporation contemplating the building of any structure in or across any canal, lateral or drainage way operated and maintained by this project shall first consult the Engineer in charge as to the proper plans, and receive from him a permit to do the work. All persons or corporations are warned against the violation of this section.

14. Assessments——

The annual per acre charge for operation and maintenance shall be levied against the entire irrigable area of each farm unit or allotment to which irrigation water can be delivered from present constructed works. Charges shall become due and payable in accordance with the annual public notice issued each year, and the provisions of the annual public notice regarding refusal of delivery of water in case of delinquency shall be enforced. [553]

15. Interference with Project Operation——

No persons other than those specifically designated by the Project Engineer are authorized to regulate project structures or to interfere in any way with project operated canals or any works appurtenant thereto, or the water flowing therein.

16. Crop and Statistical Report——

A crop and statistical report on forms furnished for that purpose will be taken each year

by the ditchrider or some person authorized to do so. This report will show the number of acres devoted to each crop, total yield and value of crops for each unit of the project and for the entire project.

* * * * *

18. Complaints ———

All complaints must be made in writing to the Project Engineer.

19. In case of dispute regarding application of rules and regulations and decisions of the project engineer made pursuant thereto, appeal may be made to the Supervising Engineer of Irrigation District No. 3 who will adjust the matter or refer same to the Commissioner of Indian Affairs whose decision will be final.

[554]

Mr. Smith: I now offer in evidence Interveners' Exhibit 18, the same being a certified copy of Construction Costs on the Flathead Irrigation Project up to and including June 30, 1938. In this connection I may explain that the exhibit is the same character of exhibit as was introduced [243] by the plaintiff as Exhibit number 5, but brings the totals down to a later date.

Mr. Simmons: No objection.

Mr. Wallace: No objection.

The Court: Just what bearing has this exhibit upon the case?

Mr. Smith: It has no specific bearing, your Honor, except that it does show what the United States had done and has expended, and ties into the Repayment Contract, in that it shows what the various land owners have to pay for the construction of the various features of the reservation, and I think it might have some bearing upon the good faith of the United States, as trustee, in adopting the particular system that was adopted for the irrigation of these lands.

The Court: Anybody question the good faith of the United States in this connection?

Mr. Smith: Well no, I think perhaps I misquoted the record as to the good faith; I should have said questioned the right of the United States, or questioned whether the United States, in using the project system as a system for the irrigation of these lands, acted in accordance with its duties as trustee under the Treaty, as interpreted by the Winters case.

The Court: I take it there is no objection to this exhibit?

Mr. Simmons: We have no objection.

Mr. Wallace: No objection.

The Court: In evidence without objection; considered read; it may be referred to by either party at any time during the trial or in briefs. [244]

Interveners' Exhibit 18 was then received in evidence without objection and is a part of the original exhibits on file in this case.

INTERVENERS' EXHIBIT 18.

Exhibit No. 18 is a duly certified copy of a report to Congress showing the cost of the Flathead Irrigation Project to June 30, 1938, to be the sum of \$8,112,649.29.

Mr. Smith: I have here, your Honor, a copy of an exhibit which Mr. Sperry is going to testify from: for the convenience of the Court and counsel I have had a copy prepared so that it may be filed.

GUY L. SPERRY

was called as a witness on behalf of the Interveners, and having been duly sworn, testified as follows:

Direct Examination

By Mr. Smith:

Q. Referring to the Interveners proposed exhibit number 19, Mr. Sperry, I will ask you to look at the first horizontal column on that exhibit and tell the Court what the first horizontal column purports to represent?

A. The column number one, the horizontal column, represents the average delivery of water to the McDonald-Deschamps Ditch based on the entire irrigable acreage of the units on which these Secretarial private rights have been awarded, for the years 1935 to 1939—inclusive, with the acreage.

Q. Now will you refer to Plaintiff's Exhibit 4; I will ask you if the green portion of the area rep-

(Testimony of Guy L. Sperry.)

resents lands which are within the Flathead Irrigation District? A. That's right.

Q. And if the pink portion represents lands which are, or have, the so called Secretarial rights?

A. That's right. [245]

Q. Now in computing the averages included in the horizontal column number one did you include only the lands which were covered by the Secretarial decree or did you include all of the irrigable lands of the defendants, as indicated on that map?

A. This includes both the lands of the Secretarial decree and the irrigable lands that are under the project system.

Q. So that, in other words, it includes both the pink and green lands as shown on that map?

A. Right.

Q. Now then in arriving at the acre foot—feet of water per acre, what sources of water were considered in your computations?

A. Both the diversions by the private ditch—by the McDonald-Deschamps private ditch—and waters delivered from the government systems.

Q. Now then as to the lands marked in green, which are lands under the project system, do those lands receive some diversions from the project system? A. Yes sir.

Q. And do those lands receive, so far as is demanded by those lands, the same amount of water as is received by other project lands?

(Testimony of Guy L. Sperry.)

A. That's right; this water is diverted to these lands if requested and on the same basis as the remaining lands in the project.

Q. Now the calculations shown in the horizontal column number one for the years 1935 to 1939 inclusive, and the averages, are obtained by what mathematical process?

A. They are obtained by taking the acreage for which the [246] Secretarial decree had been granted, and the acreage included under the project system—that is, outside of the—that is, in addition to the private acreage—added together—all waters delivered to the units, both through the private ditch and by the government, and dividing the one by the other and securing the number of acre feet per acre for the entire irrigable acreage.

Q. Now then referring solely to the acreages involved, you have, as I understand it, two sets of acreages, one the acreage of awarded rights by Secretarial decree, and the other the irrigable acreage under the project, is that correct?

A. That's right.

Q. Where do you get the figures of acreage under the Secretarial decree?

A. The acreage under the Secretarial decree was obtained by—obtained from the committee, Secretarial committee, appointed by the Secretary, for the determination of the acreage that should be under the private ditch, or the acreage under the private ditch.

(Testimony of Guy L. Sperry.)

Q. Well let me ask you, did you go to the Secretarial decree itself and ascertain from that the acreage awarded? A. That's right.

Q. And so far as the acreage, the irrigable acreage in the project is involved, how did you determine that?

A. Those are determined by well defined process, by actually going into the field, by surveys in the field by government engineers and surveyors, taking a plane table measurement—that is, a sheet was placed on the plane table and it was scaled 1 inch equal 400 feet; the ditches were actually run [247] out in the field and the acreage, the irrigable acreage determined, eliminating the highest points, that is, points that were too high to be irrigated, lands above the ditch, lands that were too rocky to pay to irrigate, and any other areas that were not irrigable, not deemed to be irrigable; and the same system was used over all the lands on the project.

Q. There was at one time a general classification of lands in the Flathead Irrigation District, wasn't there? A. That's right.

Mr. Smith: In this connection, your Honor, we ask the Court to take judicial notice of the Acts of Congress of April 23, 1904, June 25, 1910, and March 4, 1929.

The Court: Have you the citation of it?

Mr. Smith: Yes, the Act of March 4, 1929 is 45 Statutes at Large, 1539; the Act of April 23, 1904

(Testimony of Guy L. Sperry.)

is 33 Statutes at Large, page 302; and the Act of June 25, 1910 is 36 Statutes at Large, page 740.

Q. And in the course of that classification did the government engineers make a survey of every forty-acre tract within the confines of the reservation?

A. Yes.

The Court: I suggest that the witness be allowed to testify instead of counsel; let him tell us what was done, instead of you asking him if it isn't so.

Q. Tell us what was done with respect to classification of these lands?

A. The lands—the classification of the lands was after the irrigable area surveys had been made in the field of each forty-acre tract, and the sheets contained one acre [248] each sheet contained one acre; these sheets were then taken into the office and the areas, high spots, and those unirrigable areas, were eliminated, and the irrigable area designated upon the sheets, from which these acreages were transferred to the records of the project.

Q. And are those classification records now a part of the official records of the project?

A. They are a part of the official records.

Q. And are they made by you from day to day on the project? A. That's right.

Q. How soon after the actual surveys were made were the records of these facts shown by the surveys put in record form?

A. They were taken off as soon as it was practicable by the force working under the government;

(Testimony of Guy L. Sperry.)

they were immediately transferred, as soon as the areas were determined, they were transferred to the permanent record.

Q. And it was from these records that you took the irrigable acreage that is here involved within the project? A. That's right.

Q. Now then, going to the water diversion figures, how did you determine the amounts of water which was delivered by the project, to the lands involved?

Mr. Simmons: To which plaintiff objects on the ground that it is incompetent, irrelevant and immaterial, not based upon any issue involved in the case, for the reason that this action is an action in injunction and not adjudication.

The Court: The objection is overruled.

Mr. Simmons: Note our exception, please.

A. The ditch rider's duty is to deliver water to the lands [249] requesting it, if they are in a proper status to receive it, in regard to payments; they turn the water out of the canals and measure the water delivered to the land, either by means of weirs, which are measuring devices, or by estimation; daily records are kept on these deliveries and at the end of the month they are turned in to the water master; these records are kept in water record books which are permanent records; at the end of the month the amount of water is computed that has been delivered to each unit or allotment, the total

(Testimony of Guy L. Sperry.)

of these monthly deliveries comprising the total for the season.

Q. And was it from the records kept in the fashion that you have indicated, that you took the figures which you used in estimating the amount of water delivered by the project to the project lands of the defendants? A. That's right.

Q. Now then with respect to the amounts of water delivered through the Magee-Minesinger and the McDonald-Deschamps ditches, is that figure the same one that was given us by Mr. Dexter in his examination today?

A. The water, the amounts of water delivered through the private ditches are the same figures that were used in his computations, plus the water delivered through the government ditches, and then the total irrigable area is used instead of the Secretarial decree; that is the plan.

Q. Now then does column number one correctly show the amounts of water in acre feet, per acre, which were delivered to the irrigable acreages of the defendants, including both project and Secretarial decree lands, through both the project system and the McDonald-Deschamps Ditch, during the years 1935, [250] 1936, 1937, 1938 and 1939?

A. Yes, that's correct.

The Court: I would like to ask a question here, for the purpose of clarifying the matter in my own mind. Will you please interpret the first three lines

(Testimony of Guy L. Sperry.)

at the top of Exhibit 19—"Amounts of water available in acre feet per acre on Flathead Indian Reservation—Mission Valley Division—calculated under different conditions." Now what do you mean by the word "available?"

The Witness: The amounts of water available means all the water from natural flow and storage on this.

The Court: "In acre feet per acre;" what does that mean?

The Witness: The amounts that could be delivered on each—that were delivered on each irrigable acre.

The Court: And dropping down to the number 1, as I understand it, in 1935 it would be 3.61 feet of water available for every acre on the project?

The Witness: No sir, only on the lands under the McDonald-Deschamps Ditch.

The Court: That would mean that there would be available for their use that many acre feet per acre?

The Witness: That actually was delivered to them.

The Court: An acre foot means a foot of water covering a surface of one acre, as I understand?

The Witness: That's right.

The Court: And it is indicated, the figures 3.61, under 1935, means that each acre actually received that under the McDonald-Deschamps Ditch—actually received 3.61 feet of water?

(Testimony of Guy L. Sperry.)

The Witness: Right; and the depth varied from year to [251] year, varying from 3.5 to 5.17, with an average of 4.32.

The Court: Yes, I see that; but the point I was inquiring about was whether they actually received that much water on each acre subject to irrigation, during that year, for the years 1935, 1936, 1937, 1938 and 1939.

Whereupon, at 10:55 o'clock a. m. a short recess was had, at the expiration of which time the trial was resumed.

The Court: Proceed.

Q. With respect to horizontal column number one, does that figure represent actual delivery, figures, for the lands of the defendants lying under the McDonald-Deschamps Ditch?

A. The column one represents the lands lying under the—all the irrigable lands—deliveries to the irrigable—not necessarily under the McDonald-Deschamps Ditch.

Q. But it is an actual delivery figure, rather than an available figure? A. Yes.

Q. Now then Mr. Sperry, referring to horizontal column number 2, will you tell us what mathematical computation you used in determining the figures there represented, for the years 1935 to 1939, inclusive?

A. Column 2 represents the total waters delivered to the land in the McDonald-Deschamps

(Testimony of Guy L. Sperry.)

Ditch, divided by the acreage of the Secretarial decree to the private water rights granted.

Q. Now then in determining the amount of water that you used in that calculation, are the figures which you used there the same as the figures which you used in respect to Column one, in so far as delivering through the McDonald-Deschamps Ditch are concerned? A. Yes. [252]

Q. And were they obtained in exactly the same manner? A. Yes.

Q. And from the same records?

A. And from the same records.

Q. Now then the average figure involved in the horizontal column number 2 is what figure?

A. This figure is the summation of the private rights under this ditch—the figure used is the summation of the private rights?

Q. And did you obtain—where did you obtain that summation—by adding what figures?

A. From the Secretarial decree.

Q. Does horizontal column number 2 correctly show the amount of water in acre feet per acre actually diverted through the McDonald-Deschamps Ditch for the lands which were awarded Secretarial rights? A. It does.

Q. Does the figure shown in horizontal column number 2 represent the actual amounts of water delivered, divided by the acreages involved under the Secretarial decree?

(Testimony of Guy L. Sperry.)

A. Yes. I would qualify that by saying the amounts of water diverted.

Q. The amounts of water diverted from the McDonald-Deschamps Ditch? A. Yes.

The Court: Well what is the distinction there between your statement and the question of counsel? He said "Will be delivered," and you said "Diverted" to.

The Witness: The water is measured at the point of diversion instead of at the lands. [253]

The Court: The amount delivered would be the amount diverted, less the amount lost by evaporation and seepage?

The Witness: Yes.

Q. Now then do you have any calculation which would show the amount of seepage loss in the McDonald-Deschamps?

A. We have had two gaugings made in the McDonald-Deschamps Ditch and the Magee-Minesinger Ditch.

Q. And by whom were those gauges made?

A. Our hydrographer, Mr. Kemp.

Q. And were those gauges made by him in the regular course of his employment by the United States? A. Yes.

Q. Indian Irrigation Service? A. Yes.

Q. And did those gauges become a part of the official records in your office? A. Yes.

Q. Now then can you tell me what the amount

(Testimony of Guy L. Sperry.)

of loss by seepage and evaporation was, as shown by those gauges?

A. As shown by those gaugings on the McDonald-Deschamps Ditch one gauging was taken near the head of the ditch; another was taken a mile and a quarter below—approximately a mile and a quarter below the head of the ditch—on the same day, and the loss was very close to 22 per cent in the McDonald-Deschamps Ditch. In the Magee-Minesinger . . .

Q. . . . Well we will cover the Magee-Minesinger Ditch in connection with other matters. Now then if you will refer to horizontal columns 3 and 4; does horizontal column number 3 correctly show the amounts of water in acre feet per acre which were delivered to the lands lying under the Magee-Mine- [254] singer Ditch through the Magee-Minesinger Ditch, and the government system in connection with the Magee-Minesinger Ditch, and the lands lying under it, with an average of water delivered by the government system?

A. Oh, no water is delivered in this area through the government system.

Q. Now in making the computations in horizontal column number 3 did you use the same method and the same records as you used in connection with horizontal column number 1?

A. Exactly the same methods and the same system were used.

(Testimony of Guy L. Sperry.)

Q. And does horizontal column number 3 show a record of actual deliveries made, divided by the entire irrigable acreage of the lands lying under the Magee-Minesinger Ditch?

A. It indicates the actual amounts, using the diversions instead of the deliveries.

Q. Yes—then it represents the actual amounts diverted to the lands under the Magee-Minesinger Ditch, is that correct? A. That's correct.

Q. Now then in column number 4—horizontal column number 4—is that column figured in exactly the same way and from the same record as horizontal column number 2?

A. Yes that is figured in exactly the same way and from the same record as horizontal column number 2.

Q. And does horizontal column number 4 show correctly the amounts of water in acre feet per acre actually diverted for the lands awarded a right in the Secretarial decree?

A. Yes it does; the only difference between the columns 3 and 4, in this case there being no water diverted through the government system, all the water coming from the private ditch, Magee-Minesinger Ditch, is that the acreage in column [255] 4 is the Secretarial decree acreage and the acreage in column 3 used was the irrigable acreage, which diversion differs somewhat from the Secretarial decree, and where you get the irrigable acreage figure

(Testimony of Guy L. Sperry.)

used in column 3 that is taken from our regular records, as described previously.

Q. From the classification records?

A. From the classification records.

Q. Now if you will refer to horizontal column number 5, I will ask you what that represents?

A. Column number 5 is the average delivery of—well it is the delivery—the average is indicated but it is the delivery—to Dellwo, based on irrigable acreage, and by Dellwo we refer to the area indicated on the map which is the E $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Section 26, Township 20 North, Range 21, I believe; and the amounts of water delivered to this particular tract of land were obtained by or from the regular official records of the project and the average of this particular tract was obtained in the same manner as previously described, from the official records, and the total delivery for each year was divided by the irrigable acreage and the quantities indicated in the—under the various years, ranging from .96 of a foot to 1.3 acre feet at the actual deliveries to the lands of this party.

Q. With reference—going back to columns number 3 and 4 I forgot to ask you if you made computations with respect to the—computation of loss—that is, losses by seepage and evaporation, in the Magee-Minesinger Ditch?

A. There was a gauging made on the Magee-Minesinger Ditch on the same date, the same date as on the McDonald-Deschamps Ditch; one gauging

(Testimony of Guy L. Sperry.)

was made near the head of the ditch, near [256] the point of diversion, and the second gauging was made approximately two and a quarter miles from the head and instead of there being a loss indicated in this ditch there was an actual gain of eight percent of water in the ditch, which can be accounted for only by the fact that the McDonald-Deschamps Ditch or other sources of water above were actually draining into the Magee-Minesinger Ditch and adding to the flow at this point instead of there being a loss.

Q. Now then in connection with column number 6 what do the figures shown for the years 1935 to 1939, and the averages, indicate?

Mr. Simmons: Now, if the Court please, we renew our objection to that question, upon the grounds that the question is incompetent and immaterial and has no bearing on the issues involved in this case as to any of the facts disclosed in this so-called schedule or tabulation from which he is testifying as to the average delivery per irrigable acres in the entire Mission Valley Division.

The Court: The objection will be overruled.

Mr. Simmons: Exception.

Mr. Wallace: May it please the Court, I would like to object at this time to this further line of examination, along this line, upon the grounds as stated by counsel for the government and upon the further ground, may it please the Court, that the witness on the stand, as I understand the testi-

(Testimony of Guy L. Sperry.)

mony, as to column 5, has testified that represents the amount of water that was delivered to Dellwo, divided by the irrigable area of that ranch.

The Court: The objections will all be overruled now.

Mr. Simmons: If the Court please, if we could have [257] just a general objection to this line of testimony it would probably speed up this case, if the record may so show.

A. The figures in column 6 indicate the average delivery per irrigable acre to the farm area being irrigated in the entire Mission Valley Division; we didn't take all of the irrigable acreage of the Mission Valley Division but we took the irrigable acreage of the lands irrigated during those years.

Q. Now why did you not take the entire irrigable acreage of the Mission Valley Division, but limited yourself to the irrigable acreage of the farm area; why did you use that one figure in place of the other?

A. Well if we had used the whole irrigable acreage of the Mission Valley it would have, of course, made a much smaller figure, but the defendants were watering the land that was irrigable and they were taking a certain amount of water; if more land had been irrigated in the Mission Valley it would have had to be divided and a lesser amount would have been available, but since the defendants were irrigating such lands as they had in crops, presumably it would hardly have been fair to have used

(Testimony of Guy L. Sperry.)

the gross irrigable acreage and arrive at a figure that was smaller; in other words . . .

Q. . . . Let me ask you this, Mr. Sperry—there are numerous farms, or there are some farms on the reservation and within the Mission Valley Division, which have irrigable land—of farm land, which are not farmed? A. Many of them.

Q. And so that in determining the pro rata per acre share would you include irrigable acreage regardless of whether there is a demand for water for that acreage or not? [258]

A. We use only the irrigable acreage of those farms requesting water, and that naturally gives—would give a larger amount to the farms which are really using the water.

Q. Now then is there a distinction by you between the irrigable acreage of the farms irrigated and the irrigated acreage of the farms irrigated?

A. Yes there is a distinction; the irrigated area of the farms irrigated is also, in general, taking the average, is a bit less than the irrigable acreage of the farms irrigated, for the reason that in many cases if the water is short the user elects to use his quota of the water on such lands as he has that are in crops that he deems of such value that he may let part of his land go dry in order to use the available water as additional water on the land that he figures he will receive the greatest returns from.

Q. And in some years is there the necessity that he do that in order to produce crops?

(Testimony of Guy L. Sperry.)

A. There is particularly during all of these years I would say, in individual cases, that this practice is followed; some elect to spread the water over the entire acreage; some elect to use it on restricted areas; and that is a matter for the individual to decide, and the shorter the water supply the more the tendency to restrict the area over which the water is spread.

Q. In computing the figures shown in the horizontal column number 6 what records were used?

A. The regular project records of irrigable areas, the farms irrigated and the available water supply, that is, the water that is actually delivered to the land, the records from the water record books, the water actually delivered to [259] the land, and divided by the irrigable acreage of the land being irrigated, to obtain a unit figure—acre feet, per acre, delivered in these years.

Q. And does column number 6 accurately show the average delivery for irrigable acreage of farms irrigated? A. That's right.

Q. In acre feet per acre on the entire Mission Valley Division? A. Yes.

Q. Now then you have indicated in your prior testimony that there are certain storage projects on the reservation, is that correct?

A. That's correct.

Q. And how are those—who has constructed those storage projects?

(Testimony of Guy L. Sperry.)

A. Those projects were constructed by the government, for the Flathead Project, and the cost is borne—will be eventually borne by the holders of title to land under the irrigation system.

Q. Now then will you refer again to Exhibit number 4—that's the map with the green and pink, and I will ask you whether the lands shown in pink on that map, which are lands which have Secretarial rights, are in any manner assessed with the cost of the construction? A. No.

Q. Of the irrigation project facilities?

A. No they are not assessed with either construction or operation and maintenance for that particular area.

Q. So that there is no—they are not liable for the payment of any costs—any portion of the construction costs? [260] A. No sir.

Q. Now then will you briefly indicate to the Court, Mr. Sperry, the manner in which the storage facilities actually result in a greater amount of available water—if the Court will pardon me—I assume that the Court is—being a western man—is well acquainted with how that is, but in the event some other court should look into it, they might not know.

The Court: Well if they don't know they will probably pay no attention to it; but it might be well to inform them.

A. The reason for the storage reservoirs is that after the irrigation season is over in the fall there

(Testimony of Guy L. Sperry.)

is always an amount of water running in the various streams, and where every bit of water available is needed for the lands that are under an irrigation project system, it is policy to begin storing the water as soon as possible in the fall and to store it in the winter months and to store it in the spring, during the spring rains, if there are spring rains, and during the period of larger runoff when the snow is gone off the ground in the spring, and off the mountains, generally in the spring when there is a large flow of water in these streams it is collected in the reservoirs against the time when the demand for water will be greater than the supply. This is particularly true of the Flathead Project where most of the streams are comparatively small and where the water supply is low and the demand for water early in the season, of course, is small.

Q. Why is that?

A. The ground is wet, ordinarily, and the hot weather has not come to cause evaporation, and consequently your demand is small in the spring. I might say that from our records [261] the approximate demands for the year are very low in April; usually very little water is delivered in April; in May possibly 15 or 16 percent of the demand covered; in June 25 percent—26 percent; and July possibly the demand will be 31 or 32 percent, and August it will drop off again, somewhere possibly down to 18 percent, and in September it is dropped off yet possibly to eight percent; so that the way

(Testimony of Guy L. Sperry.)

the demand comes it makes it extremely useful to have a large supply of water in the reservoirs at the time of the dig demand, that is, larger amount of water available at the time of the big demand, and for this reason we have the storage systems aggregating about 98 thousand acre feet in the Mission Valley.

Q. If the water were allowed to run down the streams in the normal course of nature would all of the water that comes down in the winter and the spring be of use to the farms?

A. The water in the fall, late in the fall, through the winter and in the early spring would be lost entirely and a considerable percentage of the water would be lost during the period of big runoff because the demand is small at that time and the excess water naturally, with no storage, would run down the streams to the river.

Q. Now then with respect to the Polson Pumping Plant—the Polson Pumping Plant—would the water which is taken from those sources be available to any of the lands on the reservation, and particularly to the Mission Valley Division, in the absence of expenditures of money for pumps and pumping equipment?

A. No, naturally they would not.

Q. Now then Mr. Sperry do you have in your office any [262] record which indicates the amounts of water which are stored on the reservation each year?

(Testimony of Guy L. Sperry.)

A. Yes we have records in the office that shows the storage on the first of the month of each month during the irrigation season particularly, and the records indicate that the storage increases up to the first of July and from then on the demand exceeding the supply of the storage, of course decreases, and from these records we find various—various amounts available in storage on the first of July of each year, and we have in determining how much water will be delivered within storage made an assumption that 50 percent of the water in storage would be available for delivery to the land.

Q. By that you mean that 50 percent of the water which is available would be actually—reach the land—would actually reach the land, and that this amount of water would not be available except for storage, and then what do you base the 50 percent loss of water in storage—that is, where do you get that statement?

A. This figure cannot be definitely determined; it is a matter of judgment and experience and from our general knowledge, of long years of operation, from knowledge of the water masters, and such records as it is possible to keep, that is our best judgment that at least that amount can be delivered to the land, that would not be available except for storage.

Q. Now then as I understand it you use the figure at the first of the year to indicate the maximum amount of storage?

A. That's right.

(Testimony of Guy L. Sperry.)

Q. And in your opinion is the amount of water which is in [263] storage on the first of July, actually water which would have been lost had it not been for the storage projects? A. Yes.

Q. Now then in calculating column number 7 did you use the entire records—or what records did you use?

A. We used the records of the amount of water actually delivered to the land, by our official records, and deducted from this amount actually delivered 50 per cent of the amount in storage on July first, and divided that by the irrigable acreage of the lands irrigated for each particular year, and obtained the unit figures indicated in the columns 1935 to 1939.

Q. Now are the records of storage, records which are official records in your office? A. Yes.

Q. By whom are they prepared?

A. The records are turned in by the water masters at the end of each month; they read the gauges in their reservoirs, which gives the elevation of the reservoir, elevation of the water surface at that particular date, and from their rating tables, which have been previously prepared by the engineers, for the various elevations and reading gauges and from the rating curve or capacity curve taken of the storage at that particular time, and this is turned in to the government from the head office.

Q. And are all the records that you use in con-

(Testimony of Guy L. Sperry.)

nection with horizontal column number 7 official records of your office? A. Yes.

Q. Now . . .

A. . . . Except the computation, of course. [264]

Q. Now referring to column number 8, what does that indicate?

A. If instead of using the irrigable area of all lands irrigated we had used—we did in this column use—the irrigable area of the lands which were originally Indian allotments, and the amount of water delivered to the lands, of course, is the same amount that we have taken from our official records in the previous computations and calculations, that is made in the same manner on the unit acre feet delivered to the land obtained in the same manner, for the years 1935 to 1939.

Q. Now then in computing the figures in column number 8 did you use the entire irrigable acreage of Indian allotments?

A. Of those irrigated for that particular year.

Q. That is, you used the irrigable acreage of these Indian allotments which did not demand water during the particular year involved?

A. That's right.

Q. And does column number 8 represent an actual delivery figure or is that simply a theoretical figure of what could have been delivered?

A. That is a theoretical figure of what could have been delivered had all of the water available

(Testimony of Guy L. Sperry.)

in that particular year been delivered to these particular lands.

Q. And does column number 8 correctly show the amount of water which could have been delivered to the irrigable acreage of the farms irrigated which were originally Indian allotments, if no water had been delivered of the surplus under allotted land on the reservation? [265]

A. That's right.

Q. And in making your computations in figures number 8 all of the records used in that connection were your official government records?

A. Yes.

Q. Column number 9 indicates what?

A. Column number 9 indicates the theoretical figure that could have been delivered to the lands referred to in column 8, had we deducted acreage as in column 7.

Q. Were the records used—the computations of the figures shown in column 9, the same records which were previously used in connection with column 8 and column 7? A. Yes.

Q. And does column 9, then, correctly show the theoretical figures of the amounts of water that could have been delivered to the irrigable acres of the farms irrigated which were originally Indian allotments, if only the normal flow of water had been used?

A. That's right, on the assumption that 50 percent of the stored water would have been deducted.

(Testimony of Guy L. Sperry.)

Q. Now then in connection with what does column 10 represent?

A. Column 10 represents the amount of water that would have been available to the farm units of the Indian allotments, were each diversion two acre feet per acre; if we had taken the area of the Indian allotments which—that is, original Indian allotments—which were actually irrigated, and supplied two acre feet per acre to each irrigable acre of those Indian allotments there would have remained for the farm units the acre foot units indicated in the various [266] columns.

Q. Now then Mr. Sperry with respect to the whole of Exhibit 19, are all of the records which were used in making all of these computations, available in the United States Court building here today? A. Yes they are.

Q. And you have a man here from your office, do you, who would be willing to assist counsel for each of the parties in making an inspection of all or any portion of these records? A. Yes sir.

Q. Does the figure in column 10 include storage figures—does that include both storage and normal flow? Of water?

A. The figures in column 10 indicates storage and natural flow.

Whereupon at 12:00 o'clock noon of said day, recess was had until 2:00 o'clock p. m., when the trial was resumed.

(Testimony of Guy L. Sperry.)

Q. Mr. Sperry with reference to Exhibit 19, do all of the figures used in that exhibit refer exclusively to the Mission Valley Division of the project?

A. Yes sir.

Q. And could you go to the map, Mr. Sperry, Exhibit 4, and indicate to the Court the point at which the gaugings to determine the seepage and evaporation loss in Magee-Minesinger and McDonald-Deschamps ditches were made?

A. The gauge—one set of gaugings were made near the creek, near the point of diversion, and on the McDonald-Deschamps Ditch the exact point I can't designate, but it is about a mile and a quarter below the point of diversion, and above the point where there is a division of the waters; it [267] is somewhere in below the NE corner of 16—that is, a short distance below the corner of section 16, which is land now in the ownership of B. W. Alexander. On the Magee-Minesinger Ditch a gauging was placed near the head and at a point approximately two and a quarter miles below the diversion, above any point where the canal had diverted, and it would be not far from the southeast corner of section 8.

Q. Now in making the gaugings at these particular places, Mr. Sperry, are the points at which these gaugings were made the lowest points in the ditch at which they could be made, in making gaugings in the various diversion ditches of the defendants?

A. Yes that is true.

(Testimony of Guy L. Sperry.)

Mr. Smith: I now offer in evidence Intervener's Exhibit 19, except that portion of it reading as follows: "Amounts of Water Available in Acre Feet per acre, on Flathead Indian Reservation (Mission Valley Division) Calculated under Different Conditions," and ask leave of Court to strike a pencil through that particular portion of the exhibit.

The Court: Is there any objection to the admission of the exhibit.

Mr. Simmons: To which we object on the grounds that it is incompetent and irrelevant and has no bearing on any issues involved in this case; we object to that portion of the exhibit designated as Horizontal lines 4, 5, 6, 7, 8, 9 and 10; we have no objection to that portion of the exhibit designated as horizontal lines 1, 2 and 3.

Mr. Wallace: And the defendants object to the introduction of the offered exhibit number 19—or rather, the horizontal lines number—well the whole exhibit, on the [268] grounds that it is incompetent, irrelevant and immaterial and not proving or tending to prove any material issue in this case.

The Court: What is the purpose in striking out the legend at the top?

Mr. Smith: I think the legend at the top, your Honor, is somewhat misleading, in that the testimony of the witness varies to this extent, that it does not represent the amounts of water available but rather, represents actual delivery figures, and

(Testimony of Guy L. Sperry.)

for that reason I think that the legend at the top should be stricken because it doesn't add anything to the exhibit and does possibly make it confusing.

The Court: On the other hand won't it simply leave questions and answers in the record without any relevancy and without any connection in the case? As I recall it I asked certain questions with reference to the meaning of those words.

Mr. Smith: Yes sir, I think that is true; in view of that, your Honor, we will withdraw our suggestion, and offer Interveners' Exhibit 19.

The Court: Very well, the exhibit will be admitted, over the objection of both parties.

Interveners Exhibit 19, the instrument referred to, was then received in evidence over the objections, identified as such exhibit, and is part of the original exhibits on file in this case.

(Testimony of Guy L. Sperry.)

INTERVENERS' EXHIBIT 19

AMOUNTS OF WATER AVAILABLE IN ACRE FEET PER ACRE ON FLATHEAD INDIAN RESERVATION (MISSION VALLEY DIVISION), CALCULATED UNDER DIFFERENT CONDITIONS

	1935	1936	1937	1938	1939	Average
Average delivery to McDonald-Deschamps Ditch— based on entire irrigable acreage.....	3.61	3.50	4.36	5.17	4.95	4.32
Same based on Sec. Decree.....	9.62	9.43	11.46	13.62	13.32	11.49
Average delivery to Magee-Minesinger Ditch—based on entire irrigable acreage.....	7.95	9.03	7.85	9.31	6.46	8.12
Same based on Sec. Decree.....	7.65	8.70	7.56	8.97	6.22	7.82
Average delivery on Dellwo based on irrigable acreage ¹	1	1.27	0.96	1.25	1.30	1.19
Average delivery per irrigable acre on entire Mission Valley Division	1.15	1.27	0.96	1.12	1.18	1.14
Same as above—deducting calculated stored water.....	0.86	0.73	0.63	0.64	0.64	0.70
Average delivery per irrigable acre possible if only Indian Allotments considered.....	2.34	2.38	1.78	2.18	2.12	2.16
Same as above—deducting calculated stored water.....	1.74	1.36	1.18	1.25	1.16	1.34
Amt. Available to farm units if Indian allotments were each delivered 2 ac. ft. per acre.....	0.33	0.43	0	0.19	0.15	0.22

¹ Record lost.

These tabulations based on irrigable acreage of farms actually irrigated, except as noted.

The irrigable acreage is the sum of Class One and Class Two lands.

(Testimony of Guy L. Sperry.)

Q. Mr. Sperry as I understand it the project has been delivering water to some of the defendants lands under the Magee-Minesinger and the McDonald-Deschamps ditches?

A. Under the McDonald-Deschamps Ditch, yes I believe there [269] has none been delivered from the project system in the Magee-Minesinger Ditch. In the McDonald-Deschamps Ditch the waters that were delivered by the project were delivered from the project ditches for that portion of the irrigable area of the unit which is under the government system, not to the portion that has a Secretarial right.

Q. Now with respect to the project's deliveries to lands under the McDonald-Deschamps Ditch, are those deliveries made into the McDonald-Deschamps Ditch or are they made from any other—from other ditches and at other points?

A. They are made at other points, in general—I couldn't testify that that wasn't done in some instances—I'm not aware whether they were or not—but in general it is through the government ditch and at other points than the points at which the private ditches reach the lands.

Q. What lands are the private ditches used to irrigate?

A. The private ditches are used to irrigate the lands for which the private rights were granted, and I believe in several instances land that is also under the government system and for which there is no

(Testimony of Guy L. Sperry.)

private right, in other words the use of the private water has been extended to cover some of the additional lands even though these were under the government system and water is available for delivery to these lands.

Q. Has that been done with the consent of the project officials?

A. No, with the consent of the government.

Q. Now Mr. Sperry you have indicated prior to this time how these construction charges are borne by the lands lying under the project; well will you now indicate the method [270] in which the operation and maintenance costs of the system are borne?

A. The operation and maintenance costs of the system—that is, of the lands under the system—are borne by each acre of irrigable land, in the same proportion that is, each acre is charged in the same amount, in so far as it is possible.

Q. Now in that connection would lands which are immediately adjacent, let us say, to the source of supply, such as Post Creek lands, in the immediate vicinity of the McDonald-Deschamps Ditch, which are under the project, pay in lesser or different amounts than the lands which are in the vicinity of the intervener, Dellwo's land?

A. No there is no distinction in charges against lands that are near or far from the source of supply; the costs of the distribution of the water and the loss entailed in water diverted from the creek through the canal is assumed by the project as a

(Testimony of Guy L. Sperry.)

whole and the levies are made on the project as a whole on the basis of the irrigable acreage rather than on account of distance from the source of supply.

Q. Do the lands under the McDonald-Deschamps Ditch and the Magee-Minesinger Ditch, which have Secretarial rights, pay any operation and maintenance costs to the project?

A. I don't think that they have paid any for a number of years; it is possible that some years ago there was a time when there was not water available to these particular lands through ditches actually constructed and I believe that charges have not been levied against those lands for a number of years.

Q. Well since 1935 has there been any charges against [271] these? A. I don't believe so.

Q. Now in the actual delivery of waters in the Mission Valley Division project does the irrigation system as it is now constructed and operated deliver equal or unequal amounts to the various owners of lands under the project?

A. The system delivers equal amounts to the owners of lands under the project according to their irrigable area, in so far as is practicable. In a system of the size of the Flathead Project, with as many sources of supply from creeks—numerous creeks, and with as many reservoirs as there are on this particular portion of the project, the Mission Valley, it renders it extremely difficult to de-

(Testimony of Guy L. Sperry.)

liver absolutely the same amount of water to each acre of land that is entitled to it, but an attempt is made to do this, and we have succeeded quite closely in doing this, so that there is not very much inequality. Some years it is possible that lands in one portion of the project may have got a little bit short of their pro rata share on lands and some other extreme portion of the project might receive slightly more than their share, but these variations are quite slight and we attempt to keep them as slight as possible. In order to do that and deliver the amount of water to each tract of land that is entitled to this water and deliver the amount to which it is entitled, it is necessary for us to keep very close supervision over the supply of water; this ordinarily is quite complicated, although not as complicated as might appear on the face of it, inasmuch as early in the season we of course know how much water we have in the various reservoirs, the [272] storage; at the beginning of the season we are quite sure we will be able to deliver for instance three-quarters of a foot or possibly a foot of water per irrigable acre of land on the project. We know that in the first month or six weeks it isn't likely that an individual will actually run this amount of water, so that we can start delivering at the beginning of the season with fair assurance that we are going to deliver at least three-quarters of a foot to a foot to these lands. We have to take stock of the amount of water in storage frequently,

(Testimony of Guy L. Sperry.)

after the irrigation season starts, and get information from the water master as to the probable runoff from their streams, that is, the probable additional water that will be available, from each water master, and from his particular division; and as the year goes on we revise that estimate from month to month; then having all the information as to how many acre feet have been delivered in each division, how much water has been delivered to each unit, how much water these divisions and units still have coming, for an estimated increased quota, and by revising from time to time, we are able to approximate quite closely before the delivery.

Q. What would be meant, Mr. Sperry, by the use of a term such as rotation system, as connected with the irrigation of land?

A. A rotation system, strictly speaking, might mean that water will be turned into a particular ditch for a certain period of time, like a week or ten days, and then would be turned off, possibly put in another ditch, for a week or ten days; that would be, strictly, what is ordinarily interpreted as rotation system. However, in effect, a [273] project that has reservoirs water is a sort of rotation system all the time, as far as individual users are concerned, because the individual user puts in his application for water, giving the ditch rider certain notice in advance as to when he wants water and how much he wants, and he uses this water in the

(Testimony of Guy L. Sperry.)

quantities that he selects as being the most feasible distribution for his particular farm; he then uses this water for several days or a week or ten days and gets over his particular tract, and orders his water cut off, has his water cut off, and all of the users are doing the same thing, so that you have certain users taking the water at one time and certain other users taking water at another time, and practically this amounts to a rotation system.

Q. And that is the system that you have actually employed in the administration of the project?

A. Yes.

Q. Now does the use of a rotation system such as you have described on this project lead to any administrative difficulties in the operation of the project?

A. There are numerous difficulties in connection with the delivering of water to all the lands, inasmuch as we must have the water in the reservoirs on demand for the user at the time that he wants it, and in order to do that, and we have considerable option on the location of our water supply in the reservoirs because of the fact that we can run water through the Pablo Feed Canal north and supply numerous other reservoirs.

Q. Now then in taking care of these day to day demands of the water for the farmers is it necessary to transfer [274] water from one reservoir to another?

(Testimony of Guy L. Sperry.)

A. It is frequently necessary to do that, and that is the purpose of holding the meetings of the water masters and taking stock of the water in storage—location of the water in storage, probable needs of each water master, and in order to ascertain how much water it may be necessary to transfer north to some other reservoir in order to have water on hand at that point for delivery to the lands.

Q. Now then, Mr. Sperry, having in mind the amounts of water available for units on the Mission Valley Division generally, in the years from 1935 to 1939, inclusive, what would you say as to the effect of the water if each farmer had a continuous flow of his portion of water?

A. If each water user took his water by means of a continuous flow, and, for instance had an acre foot of water for the land for the season, and this water was spread over a four or five months period of continuous flow, the amount of that flow would be so small that it largely would be wasted or would require cutting up into very small amounts and which would make it impracticable to get over his land thoroughly and wouldn't enable him to take care of his farming duties such as cutting hay and putting his hay up and getting his crops off the ground, and it would be used to very poor advantage, if that kind of a system were practiced.

Q. Well would such a system result in an actual uneconomic use of water?

A. Very uneconomic.

(Testimony of Guy L. Sperry.)

Q. Now then what does an irrigator or an irrigation engineer mean by the term "Head of water?"

A. By head of water, in some parts of the country that [275] means a more or less definite amount of water; that is a sort of a local usage of the term head of water; for instance in——

The Court: Well we are dealing with the Flathead Reservation and the Flathead Project.

A. (continued) On the Flathead Project by head of water we mean an amount of water with which the irrigator is able to work to advantage in getting over his particular tract of land, considering the needs of that tract.

Q. Is one of your problems delivering the share of water that each user gets in sufficient quantities at different times to give him an adequate head?

A. That is a very important one of our purposes—duties.

Q. Now then, in your opinion as project manager of the Reservation, and acquainted with the use of water thereon, will you say that any system of irrigation on the Flathead Reservation and particularly in the Mission Valley Division, could possibly be economically operated without one unified control?

A. No I think that would be impossible to secure any just and equal distribution of water without some unified control so that you would have—the several agencies would have at hand all the time the amounts of water that had been delivered to vari-

(Testimony of Guy L. Sperry.)

ous lands, the amounts of water that were still to be delivered to those also, in order to make out their quotas, and without someone knowing where the water was located, what reservoir it was in and what the probable amount of water that might be expected in the future would be from the particular streams, otherwise the water would not be where it was needed when it was needed. [276]

Q. Could any individual farmer operating on the reservation, in the absence of a system of central control, determine when he had used his pro rata share of the waters of the reservation?

A. No, he wouldn't know what his pro rata share was, there would be no way for him to find out unless there was some one who had control over the whole system so he would know what the available supply was.

Q. And would that be true, in a lesser degree, to, let us say, several irrigation projects involving many units?

A. Yes it would be true of them also.

Q. Now then, having in mind, Mr. Sperry, these lands of the Flathead Reservation, where you have knowledge of the kind of crops and the character of crops there, as to use and the amount of water used and to deliver, what is your opinion as to whether or not any system of private irrigation, whether conducted by the individuals or by privately organized irrigation districts, could adequately irrigate the

(Testimony of Guy L. Sperry.)

quantity of lands which are now irrigated under the Flathead Indian Project?

A. That system of—you mean numerous smaller districts or ditches?

Q. Yes.

A. Controlled by private individuals?

Q. Yes.

A. Or groups of private individuals? It certainly would not work out to the good of the whole valley; certain groups who were close to the source of supply of the larger streams would be sitting in a preferred position, and as of course regards the amount of water that they could secure, there [277] being a small amount of waste, and as against those people who lie a considerable distance from the source of supply, the parties close to the streams would have a low cost project with little waste of water delivered to their lands and those who were at a distance would have an expensive project, having to construct a long supply canal before it could reach their lands and also to entail considerable loss of water in transmission of the water to these particular tracts, and this would result in arguments and the amounts of water that should be supplied to each particular ditch and it would have to have some central control in order to operate to any advantage at all.

Q. Well knowing the character of the lands and knowing the general yields of the lands in the Flat-

(Testimony of Guy L. Sperry.)

head and particularly the Mission Valley Division, would you say it would be possible for any group of farmers located in the extreme northern end of the Mission Valley Division to build a system to their lands and pay the costs of operation and maintenance which would fall upon them?

A. No I don't think so.

Q. Mr. Sperry, I think this morning, in speaking of the classification records you testified or you said that you had a sheet for each acre, in your classification, is that correct?

A. We have sheets for each section—if I said each acre I didn't intend to—each section we have a sheet for.

Q. Would it be possible, Mr. Sperry, in the nature of things, to adjudicate the waters of this reservation and apply to each acre of irrigable land any definite quantity of water and be assured of delivering that quantity of water [278] to the land?

A. No it would not be possible to do that for the reason that your supply changes from year to year, no two years is the same, and our acreage under the project has increased from year to year—sometimes the increase is considerable—sometimes it is small, but for the last few years it has been a continuous, that is, quite a steady increase; in the early days of the project some years were less than the preceding year but in the later years it has been an increase each year, and it isn't the same each year.

(Testimony of Guy L. Sperry.)

Q. In other words you have two factors, the amount of irrigable land is changing from year to year and the amount of water is changing from year to year? A. That's correct.

Q. In making your assessment for operation and maintenance charges what basis is used?

A. In making the assessment the basis used is the cost of operating the system.

Q. No I don't think you understand me—in the assessment to each farmer, how do you determine his share of the cost of operation and maintenance?

A. Well his share of the cost of the operation and maintenance is a definite assessment against the—each acre of irrigable land; he pays on the basis of the number of acres that he has; and the assessment, or the levy, against the particular tract and against all the tracts summed up, or the amount of money that is available to operate the system——

Q. ——Now then is the irrigable acreage based on that assessment the same figure that is used in your computations [279] in Exhibit 19, where the irrigable acreage is used? A. That's right.

Cross Examination

By Mr. Simmons:

Q. Mr. Sperry has the project at any time been able to exercise any control over the diversions of the defendants through either the Magee-Minesinger or McDonald-Deschamps ditches?

(Testimony of Guy L. Sperry.)

A. The project has attempted in some years back to control the diversions of the defendants; for several years past, before this case has been in a state of expectancy——

Q. ——Well with what effect, Mr. Sperry,—have they ever been able to control all of the amounts allocated by the Secretary?

A. No they have not.

Q. Well why is that? Because of any location of their lands?

A. The difficulty lies, in controlling the water of the defendants in this case—the difficulty lies in the fact that all these ditches take out of Post Creek below our storage supply in McDonald Lake; they are the first diversions below the Lake, and in operating the system and turning the water out of the lake down Post Creek for diversion through the Pablo Feed Canal, and we have to pass the Pablo Feed Canal down to some of the other——

Q. ——The Pablo Feed Canal is located, in other words, below the points of diversion?

A. Yes, and the defendants are in position to divert water when there is water in the creek.

Cross Examination

By Mr. Wallace: [280]

Q. Mr. Sperry these operation and maintenance figures I believe you stated take in the whole irrigable area of the lands affected?

(Testimony of Guy L. Sperry.)

A. We take in the irrigable area of the lands affected, that's right, what we consider as irrigable area at the present time.

Q. And that is true, whether or not the water users use any water for that particular year or not?

A. That's right.

Q. These operation and maintenance figures are not the same in the Flathead Irrigation District as they are in the Mission Irrigation District are they, Mr. Sperry?

A. They are not exactly the same, largely because of the fact that we operate independently in the two districts.

Q. And those two districts are both included within the Mission Valley District, or constitute the Mission Valley District?

A. That's right. I might explain just a little farther, the reason for the difference in the figures; they have an operation and maintenance charge and an administration charge; they are two separate districts; they have their one commissioner, and operate independently, so far as the administration goes; their administrative expenses vary and the collections in the two districts vary; in other words delinquencies in one district may differ from delinquencies in the other district; and for this reason each division, or each district, has to levy an amount and collect an amount sufficient to operate, and this results in some variation in the assessment.

(Testimony of Guy L. Sperry.)

Q. And are those the only reasons why there are variations [281] in the o. and m. charges between the two districts?

A. That constitutes the principal reason, possibly, although there is some difference, naturally, in operating any two different portions of the project, there would be some difference in the expense; it wouldn't necessarily follow that you could operate a 14 thousand acre proposition in one portion of the project at the same price that you might operate a 14 thousand acre proposition in another.

Q. While you testified that you attempted to make the water deliveries approximately equal to all water users on the project, you did take into consideration, did you not, the different character of land, so that some farmer gets considerable more water than others?

A. That's right, that has been the practice on this project to deliver more water to land that is extensively gravel, and the assumption that the requirements or needs of the land, in some degree governs the amount that will be diverted to it.

Q. Now you have referred to Exhibit 19, Mr. Sperry, column number 5—"Average delivery to Dellwo based on irrigable acreage"; let me ask you first, if each water user from the system makes application for water, before his water is delivered to him—if each individual makes application——

A. Yes, either orally or in writing.

(Testimony of Guy L. Sperry.)

Q. But he makes some kind of an application?

A. He makes an application yes.

Q. Now then in making up this column number 5 is that based on the amount of water that was actually delivered to Dellwo or on the amount of water that he may have requested and applied for?

A. That is based on the amounts that were actually delivered [282] to him.

Q. And so the water as delivered in column number 5 may have been all the water that he requested or applied for?

A. It might have been.

Q. Mr. Sperry there have been numerous instances, have there not, where the government, or this system project, has used the Magee-Minesinger Ditch for the purpose of delivering water to people entitled to government water, to whom you couldn't otherwise have delivered water?

A. I don't know, the water master——

The Court: If you don't know, that ends it.

Q. Is there a turnout in the Pablo Feed Canal at the place of the lands of the defendants or is the turn out in the B Canal?

A. I would say that there is some—I can't say how many—in the Feed Canal.

Q. I have reference to the turnout from which you supply water to the defendants in this case?

A. Yes, I say that I am not sure—I'm not familiar with the location of these turnouts—there might be some in both of them.

Q. Then you don't know whether that turnout in the Feed Canal is to Dellwo?

(Testimony of Guy L. Sperry.)

A. I wouldn't know.

Q. Do you know, Mr. Sperry, what percentage the gravity water going to the Mission Valley Division rises in Post Creek, in north of Post Creek?

A. In and south of Post Creek—I will say this is an estimate only, I haven't the figures—I will say more than half, considerably more than half. [283]

Q. Isn't it a fact that it is 70 percent?

A. I couldn't say.

Q. Do you know the irrigable area of the lands in the Mission Valley District?

A. The area of the—irrigable area of the lands in the Mission Valley District is around 13 thousand acres—of the total irrigable area.

Q. The area of the District itself is about 22 thousand?

A. That's right.

Q. And do you know what portion, or what part of the lands in the Mission District were owned in allotments?

A. A considerable portion of them, I don't know the percentage, but a considerable portion of those lands were allotments.

Q. Nearly all, weren't they?

A. The larger.

The Court: Now just answer the question—you answer larger.

The Witness: Well nearly all.

The Court: Was it nearly all?

The Witness: I think it was nearly all.

(Testimony of Guy L. Sperry.)

Q. I will ask you if it wasn't about ten-elevenths of the total amount?

A. I couldn't say, I haven't definite information.

Q. Do you know how many acre feet of water is required to irrigate the lands in the Mission District?

A. We have the record of it—I can't tell you off-hand.

Q. Can you tell me whether there are any pumps located in the Mission District, in connection with this district?

A. No pumps in the Mission district. [284]

Q. How much storage water is available for use in the Mission District?

A. Two of our largest reservoirs—that is, one of our largest reservoirs and that will be available for use on the Mission District, is the Tabor Reservoir, with a storage of about 23 thousand acre feet, when the work that is being done on it is completed, and which will be stored; and the Mission Reservoir, with a storage of about 7500 acre feet—are in a position to deliver water to the Mission District.

Q. And McDonald?

A. And McDonald is not in a position to deliver water to the Mission District; this water goes to—into the Post Division and on north into the Pablo Division.

Q. Can you tell me what percentage of the water that rises in the Mission District that is diverted to lands north of Post Creek?

(Testimony of Guy L. Sperry.)

A. Variable amounts, depending on the season; for the past few years this water that has been diverted is largely from excess water from the Jocko Valley; it is averaged roughly at 24 thousand acre feet, that has come through and has been run north to the Pablo Division, I believe, or to the Post Division.

Q. Twenty-four thousand acre feet?

A. Twenty-four thousand acre feet, yes; that is an estimate I think.

Q. And about what percentage of the water is that, if you know? A. I can't say exactly.

Q. Is there any of the water that is pumped in—any of the [285] government pumps—reclamation pumps—available for use actually within the Mission Irrigation District?

A. It is not available for use, that is, pumped water is not actually available for use on any of the land of the Mission Irrigation District; however by virtue of the fact that takes the place of water which has been in the past run from the south end to the north end——

Q. ——I understand, but there is none of the pumped water used in this district?

A. No, not strictly—it is available, but actually not.

Redirect Examination

By Mr. Smith:

Q. As a matter of fact, Mr. Sperry, does any appreciable amount of water that is used in this

(Testimony of Guy L. Sperry.)

project in the Mission District arise within the streams of the district itself?

A. You mean the water that actually rises in the particular district—you refer to the Mission District?

A. Yes—I will ask to strike that—where do the waters of Post Creek come from?

A. The waters of Post Creek come from the mountains, of course.

Q. Are the mountains in the Mission District?

A. No.

Q. The Mission District would, I presume, be the normal watershed for these waters?

A. Yes, part of them.

Q. When water comes out of the Crow Creek pumping plant, and when the waters out of the Polson pumping plant are available, will that have any effect on the amount of water available for use in the Mission District? [286]

A. Yes that will very materially affect the waters available for use in the Mission District.

The Court: How far in the future is that?

The Witness: The pumping plant is available at present.

The Court: We are dealing with 1935.

Mr. Smith: Mr. Wallace went into the matter of the pumps.

The Court: Well go ahead; I didn't think he mentioned the Polson pump.

(Testimony of Guy L. Sperry.)

Q. At any rate, will the operation—and does the operation—of whatever pumping facilities you have, make some difference in the amount of water available for the Mission Valley Division?

A. It very materially affects the available water for the south end of the project, in the same way that it does the other lands in the project, because of the fact that we have in the past been compelled to run water from the south end to the north end of the project, and now we will be able to hold in storage additional waters in the south end of the project because of the supply that we have for the Pablo Reservoir from this pumping plant that has been recently completed.

The Court: What is the basis on which the cost of construction is figured?

The Witness: The cost of construction of course consists of all of the various items that go into the service and construction of the plant.

The Court: I understand that, about the completion of the operating plant, but how is the cost divided?

The Witness: The cost is divided equally over the entire Mission Valley Division and the Camas Division also.

The Court: And what is the basis on which the charge [287] against each water user is made?

The Witness: The irrigable acreage on each unit is the basis of the charge.

(Testimony of Guy L. Sperry.)

The Court: In other words the charge is based on the irrigable acreage?

The Witness: That's right.

The Court: Whether it is actually cultivated or not?

The Witness: That's right.

The Court: Well now as I recall your testimony you say in certain cases a man will be given, we will say, three acre feet of water, on all of his irrigable land, and another man is paying the same cost?

The Witness: That's right.

The Court: But only gets one acre foot of water?

The Witness: One and a half, probably; the most gravelly soils have been tentatively permitted to get twice the amount of water delivered to the tighter soils, on the assumption that it is necessary to have more water for this land than for the tighter soil.

The Court: And how does that operate on the operation and maintenance costs?

The Witness: The operation and maintenance cost is the same; there is no discrimination in the operation.

The Court: Well that is what I had in mind, whether there is or is not; whether a man gets an acre foot or three acre feet, he pays the same operation and maintenance charge for an equal number of acres?

(Testimony of Guy L. Sperry.)

The Witness: That's right.

The Court: Then as a matter of practice you are trying to supply the deficiencies of nature, are you?

[288]

The Witness: That's what it amounts to.

The Court: It amounts to just this—you are trying to give each man an equal quantity, regardless of the natural value of the land?

The Witness: The extreme cases, however, are double allotments—that is——

The Court: The point I am getting at is this—if they are having the same number of irrigable acres and they pay the same cost of construction and the same cost of operation and maintenance, then the one who will require a greater supply of water gets his water without paying anything for it?

The Witness: Yes.

The Court: And why is that discrimination—how did it originate?

The Witness: The discrimination of this basis is, I would say, more or less local to the project; it has no particular official standing as regards other projects, and it is subject to revision in the future if it is determined that it should be revised.

The Court: What I am trying to get at is this—what right have you—under what authority is there an unequal distribution of water; what is the basis for that discrimination, as I call it—that may not

(Testimony of Guy L. Sperry.)

be the proper word—but one gets more or less than the other for the same?

The Witness: Well the basis for the discrimination—the only basis for the discrimination is the need of the land.

The Court: In other words—getting back, we can use the same phrase—you are trying to equalize the deficiencies of nature? [289]

The Witness: That's right.

The Court: You think that each farmer, with a certain number of acres, should have the same amount of water, as I see it, and then you say that one farmer needs more water to irrigate his crop than another farmer, so you charge them an equal amount, under this operation and maintenance and the costs of construction, and you give this man, we will say, just in round figures, twice as much water as the other gets, for the same amount of money; is that the general policy on the reservation?

The Witness: That has been the practice on the project for some time; however, I might say that there is considerable dissatisfaction over the system.

The Court: I can imagine there would be. Any further cross?

Recross Examination

By Mr. Simmons:

Q. What I want to ask is in regard to this double

(Testimony of Guy L. Sperry.)

duty proposition; wasn't that plan originally put in effect at Moiese, in the Moiese District?

A. I think the Moiese District was probably where it originated, for the reason that the Moiese Valley lies below the Crow Creek Reservoir, and all the valley is very gravelly; the soil in general is very porous, and that water that is impounded in *Creek Creek* Reservoir is not available for *use* any other point on the project, and that in so far as there is water in the Crow Creek Reservoir there is no reason for not delivering to the land——

Q. ——Well in other words you did have a lot of surplus water there, didn't you, that couldn't be used on any other [290] land? A. We did.

Q. And this double duty originally was a temporary operation and started originally under which you now——

A. ——It is a temporary affair that has no—it has official knowledge—but no official standing, as a definite permanent policy.

Q. It is merely applied to the Flathead Project and not to other projects in the northwest?

A. So far as I know, yes.

The Court: Well now that is an exceptional case; I gathered from your testimony that the situation is general; in other words, you made no difference in charges, because of location, with reference to the water supply?

The Witness: That has grown out of this case

(Testimony of Guy L. Sperry.)

to be the general present policy on the reservation.

The Court: In other words there is a unique condition, requiring peculiar handling, and so that they have made it a general rule covering the entire conditions?

The Witness: Yes.

The Court: Well now Mr. Sperry, from your testimony given in response to the Court's questions, that is the general policy in all divisions of the Flathead System now?

The Witness: That's right.

Redirect Examination

By Mr. Smith:

Q. As a matter of actual practice, Mr. Sperry, the situation is not—or that policy does not have a great deal of application to some of the divisions, is that not correct?

The Court: Well we are dwelling right now with one [291] division, as I understand it, but the question was that it applies generally throughout the entire project.

A. It would affect approximately half of the lands in the Mission District; very little of the lands in the Post Division, and possibly 20 percent of the land in the Pablo Division.

Recross Examination

By Mr. Simmons:

Q. In other words to this double duty land you deliver twice the amount of water you have avail-

(Testimony of Guy L. Sperry.)

able, normal flow and storage flow, during the irrigation season?

A. Not always twice the amount, possibly half—possibly twice as much—not in excess of twice the amount.

Q. Well if you have one acre foot you deliver one and a half or two acre feet?

A. Two acre feet may be delivered,—usually one and a half may be delivered if they are,—if the land is deemed to be somewhat between the extremes.

Q. You have no set rule; you deliver between one and two and never over two?

A. Yes, never more than twice the amount the tighter lands are receiving.

Recross Examination

By Mr. Wallace:

Q. Isn't it a fact that in so far as the Moiese Division is concerned you deliver sometimes down there as much as two and three times as much water as you do anywhere else?

A. We have, with the water available there that couldn't be delivered any place else, we have delivered several times the amount of water, but in the Mission Valley not—

Q. —Tell us what is the greatest amount of water or [292] acre feet of water of the acre feet you delivered in Moiese—what is the maximum amount?

(Testimony of Guy L. Sperry.)

A. I wouldn't be able to testify because I don't know; we delivered possibly four or five acre feet in some cases; I couldn't say what the amount was, maybe more than that.

Q. Isn't it about 7.34?

A. I wouldn't say; it is possible it may have been.

Q. It might have been as high as that?

A. It is extremely gravelly soil in the Moiese.

The Court: Well the record here, as I understand it, is that is water that would not be available for any other land?

The Witness: That's right.

Recross Examination

By Mr. Simmons:

Q. And the source of supply is entirely different than in the Mission Valley?

A. No in the Moiese it is possible to turn water from the Mission Valley down to Moiese, but when the water gets into the Lower Crow Reservoir it is not available for any other district.

The Court: What I am interested in is this—do you draw upon the supply for the land involved in this case, to supply the lands in the Moiese District?

The Witness: We draw upon the Mission Valley for water to supply the Moiese District only during the repairs to our reservoir for Lower Crow Creek Reservoir, that we have.

(Testimony of Guy L. Sperry.)

The Court: Well do you draw, is that the idea?

The Witness: If there is not water in the Crow Reser- [293] voir it is necessary to draw upon the supply from the——

The Court: What I am trying to get at is—do you actually do that, draw on the supply of water from the lands involved in this action, for use in the Moiese Division?

The Witness: I believe we did to a small extent last year when this Crow Reservoir was in repair.

Redirect Examination

By Mr. Smith:

Q. Where does the water that goes to the Moiese Division come from?

A. The water that goes to Moiese comes largely from Mud Creek, Crow Creek and Spring Creek, and return flow from all the lands that drain naturally into these streams—that is when irrigation is going on in the project, any time in the summer that other lands are being irrigated there is more or less water that does get away from the irrigator and gets into the natural water courses and it finds its way into Crow, Mud or Spring creek and goes on down into the Lower Crow Reservoir.

Q. And does that water come into Crow, Spring or Mud creek in such a place that it can be picked up by any of the other project works?

A. No, it would not. That is the only place that it can go, except I will make one exception, that we

(Testimony of Guy L. Sperry.)

do have a pumping plant just west of the railroad tracks on Crow Creek, indicated right here, the place is indicated, from which we may pump water out of Crow Creek into a canal that will carry it into Nine Pipe Reservoir.

Q. And even with that pumping plant you still have more water in Crow Creek than—— [294]

A. ——Ordinarily, after pumping eight or ten thousand acre feet of water from Crow Creek it doesn't lessen the supply that—that is, it doesn't lessen the water that goes by in Crow Creek, to the extent that it doesn't fill the reservoir, and when the reservoir is filled then of course we can pump water from the creek until it is drained down into Nine Pipe Reservoir, and we save about eight or nine or ten acre feet of water annually.

Q. And is that pumping plant a recent development?

A. Well it has been in about three years, I believe.

Recross Examination

By Mr. Wallace:

Q. You have previously testified, Mr. Sperry, that you do take quite a large amount of water out of the Mission District to take north to the north end of the Mission Valley Division, have you not?

A. We take it north through the Pablo Feed Canal; I don't know whether you would say we take it out of the Mission District or not; it is diversion water from the Jocko River, largely; it is run from

(Testimony of Guy L. Sperry.)

the Mission District and our Pablo Feed Canal north.

Q. I meant to say this—out of the Mission District water shed?

A. Yes, the Mission District water shed and the Jocko water shed.

Q. And you take it out of Post Creek?

A. We run water from Post Creek north, yes.

Q. To the north end of the Mission District?

A. Yes, but that is, we run it to the north end of the Mission Division; the feed canal of course—the Pablo Feed [295] Canal running north and all of the canals that come out of Post Creek are on the north side of the creek.

Q. Yes but what I am getting at, you take the water out of Post Creek into the Pablo Feed Canal and run it up to the north end of the Mission Division? A. That's right.

Q. And to irrigate land in the north end of this division? A. Yes.

Q. And you can take water out of Spring Creek and Mud Creek and Crow Creek? A. Yes.

Q. All of which creeks are north of Post Creek?

A. Yes.

Q. To take it into the Moiese Valley?

A. We——

Q. That's what you said?

A. We do sometimes, later in—last year, since we have the Crow Creek Reservoir it is very seldom

(Testimony of Guy L. Sperry.)

we have to run water directly below the Feed Canal to drop it way down to Moiese.

Q. But you do take some waters out of those creeks down to the Moiese Valley?

A. We can and do at times.

Q. And that has been a practice for years?

A. That was always the practice until the Crow Reservoir was put in.

Q. Now then if you were to leave the waters up in the north end of the Mission Division, the waters of Post Creek and Mud Creek and Crow Creek and those other little creeks that are picked up by the Pablo Feed Canal it wouldn't be necessary for you to run as much of the waters of the Mission District [296] to the north end, would it?

A. Well Spring Creek doesn't—

Q. —Could you answer that yes or no?

A. I couldn't agree with that statement because Spring Creek doesn't run into the Pablo Feed Canal for it is below that.

Q. Well but any of the creeks north of Post Creek that do run into the Pablo Feeder Canal, if you left that water up in the north end of the division instead of taking it down to the Moiese then it wouldn't be necessary for you to divert as much water from the Mission District watershed to go up north, would it?

A. It would affect some small amount, very little, at the present time, very little.

The Court: Well answer the question.

(Testimony of Guy L. Sperry.)

A. (continued) I would say that it would not be necessary to run as much north but that the amount that we would gain by it would be comparatively small.

Redirect Examination

By Mr. Smith:

Q. What proportion of the water taken down into the Moiese Valley would be below the Pablo Feed Canal, Mr. Sperry?

A. Most of it, practically all of it, there is a small amount—you say what proportion—I would say, oh 90 percent; that is just a guess, of course.

Witness Excused. [297]

WILEY G. MOUNTJOY

was called as a witness on behalf of the Interveners, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Smith:

Q. Your name is what, please?

A. Wiley G. Mountjoy.

Q. And what is your present occupation?

A. Watermaster in the Indian Irrigation Service.

Q. And how long have you held that position?

(Testimony of Wiley G. Mountjoy.)

A. Since 1923 I believe.

Q. And in what division of the Indian Irrigation Service are you employed?

A. The Mission Irrigation District.

Q. And where is your territory, Mr. Mountjoy, with respect to the lands covered by the Magee-Minesinger and McDonald-Deschamps ditches?

A. They are embraced within that territory.

Q. What are the boundaries of the territory covered by you?

A. The Pablo Feed Canal on the east, the Mission F Canal on the south, and Post Creek on the west—the portion right in through there has no definite boundary—I might say that it is bounded on the south by the hills between St. Ignatius and Ravalli.

Q. Are you acquainted with the Magee-Minesinger Ditch?

A. Reasonably well acquainted with it.

Q. And do you know something of the methods by which that ditch is operated by the defendants?

A. Yes.

Q. Do the defendants taking water from the Magee-Minesinger [298] Ditch ever make request of you for diversion of water into that ditch?

A. No; they would, if they made such a request of any official they would make it to Mr. Dexter.

Q. Now then do you have any knowledge of the time when the waters are to be taken into the Minesinger or into the Magee-Minesinger Ditch?

(Testimony of Wiley G. Mountjoy.)

A. No.

Q. And do you have any knowledge of when the water is to be—that has been used for irrigating lands under that ditch—is to be turned back into the stream?

A. None.

Q. Where, Mr. Mountjoy, do these two ditches tap Post Creek?

A. It is a short distance below the McDonald Lake Reservoir.

Q. And above the Pablo Feed Canal?

A. And above the Pablo Feed Canal.

Q. Does the fact that—you have no knowledge of the times when water is taken from Post Creek for the Magee-Minesinger Ditch——

The Court: It isn't in the record that there was water taken for that particular ditch; there was water taken through the ditches.

Mr. Smith: That's what I mean.

The Court: Mr. Sperry testified there was no turning of government water from the storage into that particular ditch, but there was into the McDonald-Deschamps Ditch.

Mr. Smith: That's correct.

The Court: If the fact has been assumed he knows nothing of it. [299]

Mr. Smith: What I am getting at is not the turning of government water into the ditch but the defendants turning their decreed rights into the ditch, as it affects his right to the property.

(Testimony of Wiley G. Mountjoy.)

The Court: Well if that is the purpose, all right.

Mr. Smith: Let me re-make the question.

Q. What happens, Mr. Mountjoy, in the operation of your part of the project, when water is taken from Post Creek through the Magee-Minesinger Ditch without your knowledge?

A. What happens to my ditches?

Q. Yes.

A. There is a large amount of waste water comes through; at times it is into C Canal, raising the head in there very materially, making an irregular flow in that canal.

Q. Now then when the waste water from Magee-Minesinger Ditch runs into C Canal can you make any use of that waste water?

A. We can make use of a certain portion of it, a small portion of it.

Q. And what happens to that portion of it of which you cannot make use?

A. It is carried on through to Post Creek.

Q. And what happens to it there?

A. A certain portion can be diverted by Post F; the balance of it will go on down Post Creek.

Q. And if it goes down Post Creek is it then available for other lands within the project?

A. No it isn't.

Q. Now then will you tell the Court, in your own words, why you can't take care of the waste water which comes from [300] the Magee-Minesinger Ditch?

(Testimony of Wiley G. Mountjoy.)

A. Well we never know just when it is coming; it may be a foot or two, it may be ten or twelve feet; it fills our canal sometimes very full, we have got more floods working, and so forth, and it makes the administration of that canal in the lower end rather difficult.

Q. At a time when you don't expect the waters of the Magee-Minesinger Ditch to come how do you set your ditch for its operation?

A. We carry water down Mission Creek to C Canal and throw it to the users where the farmer is low under it.

Q. Then in setting the water in Mission C Canal what do you have in mind when you make your set?

A. We have in mind to supply sufficient water for all elements on that ditch.

Q. And if water comes in which you are not expecting what use can you make of that?

A. Not very much use of it, unless we have gone back and made our arrangements clear up to the source of supply.

Q. And between the time you discover that water is coming into your Mission Canal from the Magee-Minesinger Ditch and the time that you make your arrangements, what happens to that water which is then coming in?

A. Well it is generally wasted.

Q. Does the fact that this water is taken without your knowledge of the time or place of its taking cause you some administration difficulties?

(Testimony of Wiley G. Mountjoy.)

A. It does yes.

Q. Now then Mr. Mountjoy after you get your set made to accommodate the amount of water which is coming in from the [301] Magee-Minesinger Ditch, by wasting, what happens when that water is suddenly withdrawn?

A. Well there is an inadequate or perhaps no supply in the lower end of our canals, the canals are deprived of a full head, perhaps of the entire head of water, down where they are irrigating.

Q. And does that cause inconvenience to the farmers in your system?

A. It does yes sir.

Q. Now what would you say, Mr. Mountjoy, as to whether or not the fact that the water is sometimes shut off without your knowledge of it, causes any wasting of water?

A. Well in the first place the farmer who has an inadequate head, he has been running his water over a certain run with a full head; if that head is cut in half his water will not flow further between his laterals and consequently he irrigates no additional land and that water is practically wasted.

Q. How big a head of water do you normally carry in Mission C?

A. At that point?

Q. Yes.

A. Oh I would say from two to eight feet.

Q. And how large, at times, is the discharge from the Magee-Minesinger Ditch into the Mission C at that time?

(Testimony of Wiley G. Mountjoy.)

A. It has not been measured, I would estimate perhaps 12 or a few more second feet.

Q. You have measured water, have you, in the past? A. Yes.

Q. And are you familiar with the quantities of water? A. Yes. [302]

Q. And are you reasonably able to judge, estimate, quantities of water flowing?

A. Yes I think I am.

Mr. Simmons: No cross examination.

Cross Examination

By Mr. Wallace:

Q. This water that you were speaking of, coming into C Canal, does that all come out of the Magee-Minesinger Ditch?

A. No I believe not all of it.

Q. As a matter of fact there are some springs, are there not, on the Minesinger land, or on the Gariepy land north of the Minesinger land?

A. Not on the Minesinger land.

Q. What is the land north of the Minesinger land?

A. It at present belongs to Mr. Chesnor.

Q. Well aren't there some springs on the land north of the Minesinger land?

A. No springs on the Chesnor land.

Q. Well where are those springs right in that vicinity?

A. There are some springs that rise in the dis-

(Testimony of Wiley G. Mountjoy.)

trict east of there, a small head occasionally comes through there.

Q. And those springs flow down here and are picked up in this C Canal of yours you speak of?

A. At present I believe there is only one that delivers water to C Canal; I might be mistaken about that, there might be two, but I believe there is only one.

Q. And also, Mr. Mountjoy, there is quite a large acreage of land lies east of C Canal that is irrigated?

A. There are a few farms there, there is a portion of the Chesnor farm, the larger portion of the Bert Nelson farm and [303] a very few acres of Mr. Pierce's farm.

Q. And what about the farms further up the coulee where the Magee-Minesinger Ditch runs?

A. Those don't drain in the Magee-Minesinger Ditch.

Q. So that water wouldn't necessarily be water that is diverted out of Post Creek through the Magee-Minesinger Ditch?

A. The majority of it would be.

Q. But not all of it? A. Not all.

Q. And the waste water that those farmers—or if those farmers there waste any water, then this drains down into the Magee-Minesinger Ditch and eventually into your C Canal?

A. That is true.

Q. What I am getting at, you are not trying to

(Testimony of Wiley G. Mountjoy.)

say, are you, that this 10 or 12 second feet of water that comes in the C Canal from the outside is all caused by Tom Long and Minesinger diverting water out of Post Creek, would you say?

A. I would say the great percentage of it is.

Q. Could you say all of it?

A. Not all of it.

Redirect Examination

By Mr. Smith:

Q. With respect to the springs about which Mr. Wallace has asked you, do you, in making your set, do you plan on the flow of those springs?

A. The ditch rider figures on this in a very, very minor way; the only spring which I believe at present runs there is—pertains to Mr. Nelson's water right, and he may use the water or not.

Q. Is the discharge from that spring very great, do you [304] know?

A. I would estimate it at perhaps one and a half second feet; it varies at different seasons of the year.

The Court: What is a second foot?

The Witness: A second foot in this state is 40 miner's inches.

The Court: All right, what is 40 miner's inches?

The Court: I couldn't tell you what 40 miner's inches is, I can tell you what a second foot is.

The Court: What application has it to an acre

foot; can you measure it in that way, or tell us in that way?

The Witness: One second foot flowing for 24 hours makes practically two acre feet—1.98 and some fraction over that; a second foot of water is that flow of water which will fill a cubic foot of space in one second of time.

Whereupon at 3:17 o'clock p.m. of said day recess was had for the duration of 15 minutes, at the expiration of which time the trial was resumed.

Mr. Smith: I have no further examination of this witness.

Recross Examination

By Mr. Wallace:

Q. Mr. Mountjoy you have been water master since 1922 or 1923 you say? A. Yes.

Q. And you were a ditch rider prior to that?

A. Yes.

Q. In this same—in the vicinity of the defendants' lands? A. Yes.

Q. Now this water that you speak of that rises in these [305] springs on the Pierce and Minesinger and Garipey land flows into the C Canal on Wald's land and below there?

A. Not on the Gariepy land—the Gardipe land—it flows into C Canal on Erickson's, if I'm not mistaken.

Q. And how far is that south of Tom Wald's?

A. Just across the road.

Q. From the east line? A. Yes.

(Testimony of Wiley G. Mountjoy.)

Q. And during all of the time that Mr. Crow was project manager and during all of the time that Mr. Moody was project manager Mr. Wald was permitted to take that spring water out of the C Canal, where it crosses his land, and bring it down on his land, was he not?

A. I don't believe so.

Q. Well didn't you yourself permit Mr. Wald to use that water that came into the C Canal from the springs, out of the C Canal on his land?

A. For a while I believe that was permitted but not all the time.

Q. That was permitted during all of the administration of Mr. Moody wasn't it?

A. I don't believe it was; I couldn't say at what time it was denied.

Q. But it was permitted for a while?

A. It was permitted for a while, as I recall.

Q. And then he was stopped from that, from using the water out of C Canal?

A. I believe so.

Q. And of course when you refer to these users of water that has gone into the C Canal, then it isn't necessary for [306] one of them to take as much water out of Post Creek down to the Magee-Minesinger Ditch to irrigate his land?

A. I presume not.

Q. And if he were still permitted to use that spring water that goes into C Canal, on his land,

(Testimony of Wiley G. Mountjoy.)

it wouldn't flow on down the canal and be wasted, as you say it now is, would it?

A. I didn't say it was wasted when it went down the canal.

Q. I misunderstood you then.

A. I said that excess of water would be wasted when it went down the canal.

Q. And if he were permitted to use this spring water there wouldn't be any excess water would there? A. Well——

Q. ——To be wasted, would there?

A. That can hardly be answered in a yes or no manner; if he were permitted to use water when he saw fit, without any request through our office, and also permitted to turn it back into our canal when he saw fit, without notifying us, that would be waste, the same as the water from Post Creek is.

Q. But he wouldn't be turning any water back into C Canal that he had taken out on the west side of the canal at all? Land irrigated on the west side of the canal, would he?

A. He might shut the turnout off without notifying us.

Q. But I understood you to say if he had been turning water back into the canal—he wouldn't be doing that, would he?

A. If he turned the turnout that would be equivalent to turning it back into the canal.

Q. Do you know why we are in dispute and no

(Testimony of Wiley G. Mountjoy.)

longer permitted from the use of this spring water after it enters the [307] C Canal?

A. Yes because we couldn't deliver a steady flow to you below that spring.

Q. Well these spring waters still have quite an effect on the amount of water that normally flows down C Canal, would it? A. Why naturally.

Q. Well couldn't you still run water down C Canal for the farmers below?

A. We could, yes.

Q. Then I don't see that it would have any effect on it, would it? A. Why wouldn't it?

Q. I'm asking you? A. It would, yes.

The Court: Can you tell me why?

The Witness: Because, your Honor, if Mr. Wald were using water, using this spring water, we would have to turn more water down from the head of C Canal from McDonald Lake to supply the farmers below: if one of them farmers suddenly decides to use that water, turns it on down the canal, then there is an excess in the canal from that point on.

Q. Mr. Mountjoy this water that you have just been talking about does go into the Magee-Minesinger Ditch, does it?

A. This water that rises on the Garipey land?

Q. Pierce and Minesinger and Garipey land?

A. No I believe not.

Q. So whether——

(Testimony of Wiley G. Mountjoy.)

A. —All of it that rises on Minesinger's would reach the end of the Magee-Minesinger land—or Mr. Wald's farm [308] laterals before it reaches C Canal, or most of it would.

Q. Well whether Mr. Wald uses any of that spring water or not you still have it to contend with in your C Canal? A. Yes.

Q. And so whether or not he has, in the Magee-Minesinger Ditch, or whether or not he uses any water out of the Magee-Minesinger Ditch, you still have to contend with this spring water, don't you?

A. Yes.

Redirect Examination

By Mr. Smith:

Q. Mr. Mountjoy is the spring water the only water which you have to contend with in the Mission Creek Canal under the present system of operations in the Magee-Minesinger Ditch?

A. No it is not.

Q. And is it a big proportion of the water you have to contend with?

A. It is a small proportion.

Recross Examination

By Mr. Wallace:

Q. The waste water from Mr. Wald's irrigation, on the land east of the ditch, that goes into the C Canal, if he were permitted he could still take that out and use it on the land—his land, west of the canal, couldn't he? A. He could yes.

(Testimony of Wiley G. Mountjoy.)

Q. But he is not permitted to do so now?

A. No.

Q. And has not been permitted since Mr. Gerharz and Mr. Sperry have been project managers?

A. I believe previous to that. [309]

Q. But under the administrations of Mr. Moody and Mr. Crow he was permitted to retake and re-use that waste water?

A. Not under all of the administration of Mr. Moody, if I recall correctly.

Q. But some of the time?

A. Some of the time.

Witness Excused.

C. H. DEXTER

was called as a witness on behalf of the interveners and having been heretofore duly sworn testified as follows:

Direct Examination

By Mr. Smith:

Q. You are the same Mr. Dexter who has heretofore testified in this case? A. Yes sir.

Q. And you are the watermaster on the Post Division of the Flathead Irrigation Project?

A. Yes sir.

Q. And I think you outlined the boundaries of that division previously; are the lands of the de-

(Testimony of C. H. Dexter.)

defendants, lying under the Magee-Minesinger—and the ditches—within your division? A. No sir.

Q. In the supervision of your portion of the division do you take care of the waters of Post Creek? A. I do.

Q. And from what place to what place do you have your jurisdiction over it?

A. From Post Creek where it comes out of McDonald Lake to [310] the head of Post F Canal.

Q. Where do the defendants take their water out of Post Creek?

A. Just below McDonald Lake.

Q. And from what canal do you irrigate the lands in your division, Mr. Dexter?

A. Well we operate through the Pablo Feed Canal, the Kicking Horse Feed Canal and Post F.

Q. Now then does the taking of water out of Post Creek into the McDonald-Deschamps and the Magee-Minesinger ditches affect the amounts of water flowing in your ditches which you use to irrigate your lands? A. It does.

Q. And in what manner does it do that?

A. Well we have the ditch set, and without any notice the heads are increased in Wald's ditch or the Magee-Minesinger Ditch or the McDonald Deschamps Ditch, and we are short; and if we go up and get the creek raised up to where we are not short, and then finish resetting, and without any notice they shut the water off, then we have a surplus going down Post Creek which is wasted.

(Testimony of C. H. Dexter.)

Q. Now then assuming water is turned into each of the ditches which we have mentioned, that is, the Magee-Minesinger or the McDonald-Deschamps, and the water becomes short in the canal with which you are irrigating the lands in your division, where do you go to get your additional supply?

A. McDonald Lake.

Q. In the actual operation of the project, Mr. Dexter, do these defendants having lands under the Magee-Minesinger and McDonald-Deschamps ditches ever advise you when they are going [311] to take water into their ditches or when they are going to shut the water off? A. They do not.

Q. What happens to the farmers, and your farmers, when amounts of water are suddenly and without your knowledge taken into these private ditches?

A. Well down on Post F when the water gets low in there why I generally have a delegation of farmers up to see me about it, why it got low, because it shuts off their irrigation and if they are irrigating with a head of water and it slacks off why they are just out, and the next day the ditch rider must come around and increase their head.

Q. How long does it take when you are interviewing the farmers on Post F in an effort to make arrangements to take care of them?

A. About 24 hours to get the water from Mission Creek to F Canal again.

(Testimony of C. H. Dexter.)

Q. During that period of 24 hours is there any wastage of the water which other farmers are actually receiving?

A. Well there is a waste in this way; if a man is irrigating and his head goes down and he doesn't cover the land he anticipates he will cover between runs, then when he gets the later increase he has got to go over that same land.

Q. Now then after the water is taken out into the Magee-Minesinger and McDonald-Deschamps ditches, you make a new set, do you not, from McDonald Lake? A. Yes.

Q. After that set is made and the water is shut off in the McDonald-Deschamps Ditch and the Magee-Minesinger Ditch, or either of them, then what happens to your distribution system? [312]

A. Well it is usually wasted down Post Creek unless we get up and shut it down and reset it again.

Q. And after you discover these ditches have been turned back into Post Creek how long does it take to make your reset?

A. Oh about 12 hours.

Q. And during——

A. ——It all depends on when you happen to catch it.

Q. And during that 12 hour period can you make any use of the excess water which is then going down? A. No.

(Testimony of C. H. Dexter.)

Q. As watermaster of this division have you ever made any attempt to regulate the amounts of water flowing in the McDonald-Deschamps and the Magee-Minesinger ditches?

A. Prior to 1935, under Mr. Moody's jurisdiction we did, yes.

Q. And what did you do in that respect, that is, physically, with respect to trying to regulate the amounts of water?

A. Well during that period when there were no controls in the ditches below McDonald Lake, and we occasionally built dams across, put a dam in across the outlet of the ditch to cut down the water.

Q. And did you do that with both of those ditches? A. Yes.

Q. And after you put your dam in then what happened?

A. Why the next time I went up why the dam was out.

Q. Do you know who took it out?

A. No I don't.

Q. And did that happen on one occasion or more than one occasion? [313]

A. Well lots of occasions.

Q. You just had a stone-throwing contest?

A. Threw just about all of the rocks out in the bottom of Post Creek up there.

Mr. Simmons: No cross examination.

(Testimony of C. H. Dexter.)

Cross Examination

By Mr. Wallace:

Q. Generally speaking has there always been a shortage of water among the farmers who are to receive the water from the three canals over which you have jurisdiction? A. Yes.

Q. Now you say these farmers, defendants in this case, have used the Magee-Minesinger and the McDonald Deschamps ditches, turned the water in and shut it off, without any notice to you?

A. Yes sir.

Q. Does that happen quite frequently?

A. Well every time they make a change.

Q. Do they make a change quite frequently?

A. Sometimes; sometimes it runs steady for a long time.

Q. And then when they get through irrigating they shut the ditches down, do they? A. Yes.

Q. Sir? A. Yes.

Q. Now they have never—has any of these defendants ever refused to tell you when they were going to irrigate or when they were going to shut the water down?

A. Well the defendants are all a long ways from my division and I never happen to see them. [314]

Q. Now then if you will answer my question please, Mr. Dexter?

A. I didn't get your question.

Q. I asked you if any of the defendants in this

(Testimony of C. H. Dexter.)

case have ever refused to tell you when they were going to turn water into those ditches or when they were going to shut the water down in their two ditches? A. No.

Q. You rather expected them or wanted them to come and notify you or some of your ditch riders?

A. That's the plan we operate under.

Q. But you have no reason to believe that if they were asked, that these defendants would not tell you when they were going to irrigate and when they were going to shut the water down, have you?

A. No.

Q. Well Mr. Dexter, if by reason of these operations there has been an excess of water going down the canal over which you have supervision, what is to prevent you from giving it to some farmer and letting him irrigate with it, rather than to waste it and send it on down the creek?

A. Well if we knew it was going to continue we would try to use it but we don't know how long it will continue.

Q. Some of these farmers could make use of this excess water couldn't they?

A. They do unless it is shut off on them.

Q. And if there is excess water and the farmer uses it then it isn't wasted is it?

A. Well not in one sense of the word, no.

(Testimony of C. H. Dexter.)

Redirect Examination

By Mr. Smith: [315]

Q. Can a farmer get ready to irrigate—take water—on just a few minutes notice, so that he can do his irrigating?

A. We require 24 hours notice for delivery of water.

Q. What I mean is this—if you find that you have more water in Post Creek than you need for the farmer who plans to need the irrigation, and you went to one of them, on very short notice, could he get ready to make his set, get his land and men ready to immediately irrigate with this water?

A. Well if he is right short of water he might, but I don't know how that would work out—I never tried that.

Q. In such an event would it involve going around and seeing all the farmers on the ditch to find out which of them could possibly use water?

A. It would.

Recross Examination

By Mr. Wallace:

Q. You have a ditch rider on the ditch all the time, don't you?

A. Yes sir.

Witness Excused.

DENNIS A. DELLWO,

one of the interveners, was called as a witness on behalf of the interveners, and having been first duly sworn testified as follows:

Direct Examination

By Mr. Smith:

Q. Your name is Dennis A. Dellwo?

A. Yes sir.

Q. And you are one of the *defendants* in this law suit? [316]

A. Yes sir.

Q. One of the interveners, I mean?

A. That's it.

Q. And are you the owner of a tract of land described as the E $\frac{1}{2}$ SW $\frac{1}{4}$ Section 26, Township 20 North, Range 21 West?

A. Yes I am.

Q. And is this tract of land marked on the map in red, close to the name D. A. Dellwo, your tract of land?

A. That's right.

Q. Do you hold any official position with the Flathead Irrigation District?

A. I am commissioner of the district; I am secretary of the board of commissioners.

Q. And how long have you held those positions?

A. Since the district was created.

Q. And when was that?

A. In 1927.

Q. And prior to 1927 did you have experience with irrigation and under the Flathead Irrigation Project?

A. Yes, I received the first water that came from the ditch under which my land is served.

(Testimony of Dennis A. Dellwo.)

Q. And about when was that?

A. In 1918 I'm sure.

Q. And how long have you been on the Flathead Indian Reservation as a land owner?

A. I homesteaded there in 1910; I have been there practically ever since; we were gone for a year or so.

Q. During the years from 1935 to 1939 inclusive have you farmed the land which we have mentioned and which is marked on that map in red? [317]

A. Yes sir.

Q. And during that period of time have you requested from the Flathead Irrigation Project all of the water which you could get from the project?

A. I am quite sure that we have—of course we might have a small residue left, of our allowance—during most of the year I am sure we did, yes.

Q. And could you, in the years from 1935 to 1939 inclusive, have used more water to beneficial advantage on that particular piece of land?

A. Oh yes, during those years we, in common with all the rest of the farmers under that division, and I think likely under the whole project, practiced dry land farming on a part of our farms in order that we might conserve our allowance of the water on a smaller part of our farms and save at least a part of the crops on our lands.

Q. Having reference particularly to the year 1935, do you recall whether or not there was a water shortage in that year?

(Testimony of Dennis A. Dellwo.)

A. Yes there was quite a terrific water shortage that year.

Q. What did that water shortage do, if anything, in the way of crop damage?

A. Practically all of the new seeding that year was destroyed by drought; many of the farmers were out of water in the early part of August and the latter part of July and their pastures dried up, their hay made about a half a crop, their alfalfa went into the winter quarter dry, and consequently made a short crop the following year; their sugar beets made a light tonnage; in fact I heard frequent complaints of farmers that their beets when they dug them were loose in the ground because they had really shrunken [318] in size during the dry months previous to digging time.

Q. Do you know of your own knowledge, apart from what anybody told you, that during the year 1935 there was an acute shortage of water?

A. Yes indeed.

Q. And that there was actual crop damage resulting from it?

A. Yes indeed there was.

Q. Now during the years subsequent to 1935 what would you say as to whether or not you, and others of your neighbors, could have used a greater quantity of water to a beneficial advantage?

A. During all of those years they could have; the allowance of water by the project, to my division, ran from about .90 to about 1.15 of an acre

(Testimony of Dennis A. Dellwo.)

foot of water per acre, and that is not sufficient to produce maximum crops on our land.

Q. And what is the result of that shortened allowance, generally?

A. The result is that as a farmer sees that he is going to lose part of his crop he abandons part of his area and doesn't water it at all and takes the loss there, with the hope of maturing his crops on the balance of his farm.

Q. Would—in a year like 1935, or any other dry year, would 500 or 1000 acre feet of water make any appreciable difference to the farmers in your area?

A. Yes it would make a very appreciable difference. If I might illustrate—the fact that the Crow Pumping Plant was completed in the latter part of August—our gravity supply had been exhausted—we had expected to pump probably a thousand acre feet of water that fall in time to be of some use—and the question arose on the part of the project management [319] whether they should distribute that water or put it in storage for the following year, and of course I was asked for my opinion on that question, and I told the project management that if he attempted to store a thousand acre feet of water, with our crops burning up, that there would be a mob up after him before very long; a thousand acre feet of water meant that the sugar beets could be completed, that the pasture could be restored, that new seedings could be saved, and on a large

(Testimony of Dennis A. Dellwo.)

area of land a thousand acre feet of water to finish up the season can be spread over four or five hundred acres.

Q. Now having in mind your experience as a commissioner of the Flathead Irrigation Project, or District, and also your acquaintance with the land owners in the project, and your own experience as a farmer on the project, what is your opinion as to whether or not it would be possible for you or any group of your neighbors located on the lands in your location, to build a system of diversions to irrigate those lands without help from parties lying closer to the sources of supply?

A. It would be absolutely out of the question; that is illustrated very forcefully by the fact that we have had to appeal to the United States for relief from construction charges, as it is, under the very reasonable rates that the United States granted to our project, notwithstanding the fact that we have no interest to pay on the construction charges at all, we still have had to appeal to the United States for relief from construction charges.

Q. And that is true, is it not, even though you who live some considerable distance from the immediate source of supply are helped in the payment of your construction and [320] operation and maintenance charges by those lying immediate to the source of supply?

A. That is right for anyone as far from the

(Testimony of Dennis A. Dellwo.)

source as my land is, even if a large number of us band together it would be economically impossible for us to collect the waters in the mountains and bring them to our lands and expect to make any reasonable return from our lands.

Q. Your land is a former Indian allotment, isn't it? A. Yes.

Q. And your land receives only the so-called single allowance of water? A. That's right.

Q. Do you have any knowledge of the administration of the project by the project officials of the Flathead Irrigation Project?

A. Yes the project—the management is in frequent consultation with our board of commissioners on matters of policy, and in my position as secretary of the Flathead District I manage to and make it a point to keep myself informed.

Q. Now then having in mind your experience in that connection, your experience as a land owner, what would you say as to whether or not any group or groups of private civilians could possibly handle the administrative problems involved in carrying the waters of the Mission Division to the lands in that division?

A. It would create a state of high confusion, for the reason that the waters supplying that country originate from such a wide source; for instance, our system now reaches over beyond the natural watershed of the Mission Valley, and the head waters of

(Testimony of Dennis A. Dellwo.)

the Blackfoot River on the [321] east; they reach clear over into the Little Thompson watershed on the west; clear up into the Little Bitter Root lakes on the northwest, and with the attempt apparently to divert every available supply of gravity water to that storage, and it would be extremely difficult for the farmers to ever organize themselves to do that, and if they should organize * * *

Q. * * * Once organized could two or more groups possibly, in your opinion, handle the administration details?

A. They would have to have some consolidated or central body, they would simply have to have that, because there would have to be someone in authority to allocate the waters, those several waters, to those many, many tracts of land.

Q. As an individual farmer, Mr. Dellwo, are you required, in taking your water from the project system, to know, in the absence of the advice given you by the project, when you have used, or approximately used, your proportionate share of the water?

A. If I am advised in advance what my proportionate share is going to be, and keep track of my deliveries, I can tell of course very closely, but I don't believe the ditch riders make that a matter of daily record in their reports of measuring water so I get them to report, of course from my ditch riders—once a month in regular order.

Q. What I am getting at is this—if you were operating your land without any central irrigation

(Testimony of Dennis A. Dellwo.)

system could you know—would you have any way of knowing what your proportionate share would be?

A. No—you mean, would I have any way of knowing what my share of all that water would be?

[322]

Q. Even for water necessary?

A. No I wouldn't have any way of knowing that.

Q. Now then as I understand it there was some testimony about the levy against the land owners in the Flathead District and the Mission Valley District, is that true?

A. I was under the impression there was not any difference but the project manager tells me that sometimes there is some slight difference in the—we have two different levies—now we must understand one another—the effect of those two different kinds of levies—the United States levies the district and the district in turn levies the land holders; now I have been under the impression the levy made by the United States against the lands in the entire Mission Valley were equal or approximately equal to the levy made by the district against the land; if the two districts are not equal that is a matter of district management, probably a matter of government or project policy, the difference in these levies.

Q. The administration levy you make goes to the district, does it, for the payment of its officers as salaries and supplies?

A. That's right; and the operation and mainte-

(Testimony of Dennis A. Dellwo.)

nance levy goes to pay the operation and maintenance levy which the government has levied against the district as a corporation.

Q. And do you know as a matter of fact whether there is any considerable difference in the administration levy?

A. Yes there has been a very large difference; the Flathead District is a large district, and the cost per acre for administration has been very, very much less than the levies on the other irrigation districts. [323]

Mr. Simmons; No cross examination.

Cross Examination

By Mr. Wallace:

Q. Did I understand you to say that the levies made by the United States of the two districts are the same?

A. I don't know what you understood me to say; I said that I had been assuming they were the same or approximately the same, but I have been advised by the project manager today that there is sometimes some small difference.

Q. For instance, last year did the Flathead Irrigation District levy an assessment for pumping charges? A. The Flathead Irrigation District?

Q. Yes.

A. You mean the district levied against the land owners?

(Testimony of Dennis A. Dellwo.)

Q. Yes. A. Yes we did.

Q. And did the Mission Irrigation District?

A. I suppose they did.

Q. You don't know. You have spoken of the waters of the Little Bitter Root and the Thompson River?

A. Yes.

Q. None of those waters are used in the Mission Valley?

A. No.

Q. That is over on the Camas?

A. On the Camas division of the project.

Q. And you have no reason, have you, to believe that there will ever be an abundance of water—by that I mean a sufficient amount of water, to properly irrigate all of the lands that the Reclamation Service, or the service contemplates putting under water?

[324]

A. Well that is a far question and the answer to it might be, if anything at all, very far indeed, that question and my answer; if the people of the Flathead Project ever have plenty of water it will be about the worst thing for the project that ever happened; I think when the people of the project have enough water so that they will make occasional use of it, then they are well off, but to give a man enough water so that he says he has plenty, I don't think the project has been built yet that can do that.

Q. All right I will change the question—given the occasional amount of water required—do you

(Testimony of Dennis A. Dellwo.)

have reason to believe that they will ever have enough to advantage?

A. Yes, a lot of reason.

Q. There is a study being made by the Walker Commission, is there not, for the purpose of decreasing the area of this project?

A. No not for that purpose.

Q. It is one of the purposes?

A. The study made by Mr. Walker is being made for the purpose of considering a method of replacement of construction that can be met by the farmers in the project, and he has suggested that possibly some sizeable area of less productive lands, it might be advisable to drop from the project.

Q. Were you present at a conference one day this winter in the city of Missoula when Mr. Walker, Director of the Indian Irrigation Service, was here from Washington, at which time he discussed this matter with us?

A. Yes.

Q. And didn't he at that time tell us that that was one of the very purposes of the Walker Commission? [325]

A. Not the very purpose.

Q. I said one of the purposes of the Walker Commission was to make an investigation and study of the Flathead Project, and one of the purposes was to find out how much they should reduce the area—or the contemplated area I should say—of the Flathead Project, to the end that there might be a sufficient amount of water——

(Testimony of Dennis A. Dellwo.)

A. —He might have said that—I wouldn't say whether he did or not—but it would be a matter of conversation only, as he was endeavoring to make a purely economic study, and if he suggested that to us—and we didn't agree with him sometimes.

Q. I hadn't quite finished when you answered—and he did tell us that, though, didn't he?

A. Now I told you I wouldn't say whether he told us or not, but he might have, in the course of a general conversation, he might have said that and many other things.

Q. And you really believe that that is what is being done by the Walker Commission and that the Walker Commission will recommend——

A. —I really believe that he was considering that question—not that he was going to recommend anything.

Q. You really believe, don't you, that the Walker Commission is going to recommend that a lot of this so-called pasture free land that is not now being irrigated could be eliminated from this project so there may be a sufficient amount of water available both by natural flow and storage and pumping, for the balance of the land irrigable in the project?

A. You ask me if I believe that, or he said that?

Q. I asked you if you believe he is going to recommend that? [326]

A. Oh I couldn't say what he is going to recommend. That idea has been discussed on this——

(Testimony of Dennis A. Dellwo.)

The Court: Mr. Dellwo wants to talk so we will let him talk.

A. (continued) That idea has been discussed, your Honor, with the thought in mind not only of eliminating undesirable land and non-productive land and lands which the people who own them don't want in the project, but with the further idea that there might be other lands not now in the project which it is desirable to irrigate, which could be brought in to take their place.

Q. Well practically all the Class 1 and Class 2 lands are now in the project, aren't they?

A. No; it is my opinion that there will be applications from people to come into the project that will probably cover 20 thousand more acres of land in the Mission Valley; we have them all the time.

Q. Where is that land?

A. Along the foot of the mountains east of the Mission Valley clear up above Finley Point; for instance we have people before our board every little while wondering why they can't get in and get their land irrigated.

Q. A large proportion of that land you are talking about now is now being irrigated by these so-called private Secretarial rights?

A. No, none of those, who are asking to get in; we haven't had any holders of private rights asking to get in.

Q. I believe that, all right.

A. They have free use of water in there.

(Testimony of Dennis A. Dellwo.)

Q. I see. But this 20 thousand acres you are speaking of along east of the Mission Range—or west of the Mission Range [327] on the east side—is now land that is being irrigated——

A. ——I don't like to re-shape your question, but you are speaking of lands that have a private water right, and not the lands I am speaking of now—I am speaking of other lands that don't have.

Witness Excused.

Mr. Smith: I now offer in evidence Exhibit 13 and Exhibit 20; Exhibit 13 being excerpt from the Report of the Commissioner of Indian Affairs, 1907, Volume 2, page 52; and Exhibit 20 being excerpt from the Seventh Annual Report of the Reclamation Service, 1908, pages 100 and 101. These exhibits have both been given to counsel, with the volumes from which they were taken, and as I understand it counsel have no objection.

Mr. Simmons: No objection.

Mr. Wallace: No objection.

The Court: These exhibits will be admitted.

Interveners Exhibit 13 and Interveners Exhibit 20, being the instruments so referred to, were thereupon received in evidence without objection, identified as such exhibits, and the said exhibits are on file with and form a part of the original exhibits in this case.

INTERVENERS' EXHIBIT 13

EXCERPT FROM REPORT OF THE COM-
MISSIONER OF INDIAN AFFAIRS, 1907,
VOL. 2. Page 52.

Flathead—On April 26, 1907, the Director of the Reclamation Service was asked to make a preliminary investigation on the Flathead Reservation in Montana to enable me to recommend the legislation needed for an adequate system of irrigation for the Indians to be allotted and for the lands to be disposed of under act of April 23, 1904 (33 Stat. L., 302). No report has yet been received from him.

INTERVENERS' EXHIBIT 20

EXCERPT FROM SEVENTH ANNUAL RE-
PORT OF RECLAMATION SERVICE, 1908

Pages 100-101

FLATHEAD PROJECT (INDIAN SERVICE)

General Statement

The principal data relating to the Flathead project are summarized as follows:

Counties: Flathead, Sanders, and Missoula.

Townships: 15 to 24 N., Rs. 18 to 25 W.

Irrigable area: 130,000 acres. Ownership, Indian lands.

Average elevation of irrigable area: 2,800 feet above sea level.

Range of temperature on irrigable area: Maximum, 100° ; Minimum, -20° .

Character of soil of irrigable area: Clay, forest loam, and gravelly loam.

Principal products: Alfalfa, grain, vegetables, apples, and small fruits.

Railroad stations: Evaro, Arlee, Ravalli, Dixon, and Perma, Montana.

Railroad: Northern Pacific.

Principal markets: Local mining and lumber camps.

The irrigation plan of the Flathead project will provide for the irrigation of about 130,000 acres in various parts of the Flathead Indian Reservation. Water will be taken by simple diversion works from the Jocko River and several creeks rising in the Mission Mountains, the late summer flow being supplemented by storage in several reservoirs, of which Lakes St. Mary and McDonald will form two, and by pumping from the Pend Oreille River. The falls of the Pend Oreille River afford opportunity to develop much more power than is necessary to irrigate the arable land within reach. Studies [539] are being undertaken to learn the amount of and best method of utilizing this power. The fall is about 240 feet in 6 miles, and the minimum natural flow last winter was 2,500 second feet, but the average flow is much larger.

Authorization

By an act of the Sixtieth Congress, first session (Public No. 104), an appropriation of \$50,000 for preliminary surveys, plans, and estimates of irrigating systems to irrigate the allotted lands of the Indians of the Flathead Reservation in Montana and the unallotted irrigable lands to be disposed of under the act of April 23, 1904, and entitled "An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation in the State of Montana, and the sale and disposal of all surplus lands after allotment," and to begin the construction of the same. The cost of the entire work is being reimbursed from the proceeds of the sale of the land within the reservation.

Surveys

Reconnaissance surveys were begun in 1907, and in June, 1908, two parties began work, one in Jocko River Valley, where about 11,000 acres of land may easily be reached from the Jocko River, and the other in the Mission Creek Valley, where there are about 20,000 acres of arable land. Work is being pushed on these tracts where the problems of construction are the simplest, and it is expected to have portions of each of the areas ready for construction of canal systems in the spring of 1909. Work is also being done in determining the available water in the smaller streams and the lands that may be

covered. Allotments have been made to the Indians in many widely separated parts of the reservation, and many small irrigation plants will be required to reach all lands that are susceptible of irrigation.

[540]

Mr. Smith: The Interveners rest, your Honor.

The Court: Open for the defendants.

And thereupon the following evidence was introduced by the defendants upon behalf of their case in chief: [328]

RAY BIGGERSTAFF

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. State your name? A. Lee Biggerstaff.

Q. And you live on the former Flathead Indian Reservation? A. I do.

Q. How long have you lived up there?

A. Since March 1, 1912.

Q. Did you homestead on this reservation?

A. Yes sir.

Q. And what year?

A. I filed on my homestead the 17 of November 1911.

Q. Do you have any connection with the Mission Irrigation District?

(Testimony of Ray Biggerstaff.)

A. I am secretary of the Mission Irrigation District.

Q. And how long have you been secretary of that district?

A. Since the third Saturday in April, 1926.

Q. That's the day the district was formed, or created?

A. I beg pardon—I think I should have said 1927.

Q. You have been secretary since it was created?

A. No there was a short period in there that there was another secretary, between August, 1926, and the third Saturday in April following.

Mr. Wallace: May it please the Court we desire to offer in evidence at this time the defendants' proposed exhibit 12, which was identified this morning by the witness Hanna, and which is a Report by the Committee appointed to [329] ascertain the amounts of the private water rights, on April 23, 1907, to which is attached a further finding of the committee with reference to the Oro Deschamps allotment.

Mr. Simmons: To which the plaintiff objects on the ground that it is incompetent and immaterial, has no bearing on any of the issues in this case. This certified copy represents a grant by the Secretary of the Interior to the lands of one of the defendants in this case for the waters of June Creek and not Post Creek: the waters of June Creek

(Testimony of Ray Biggerstaff.)

are not involved in the case; and in the plaintiff's complaint we have pleaded and recognized the so-called Secretarial rights to the lands of the defendant Bert Lish, which were formerly designated as the Oro Deschamps allotment, this is an endorsement of the grant made in 1927 but not to the waters of Post Creek, but June Creek; June Creek is a tributary of Post Creek but flows into Post Creek below the point of diversion of the defendant.

The Court: Overruled.

Defendants' Exhibit 12, the instrument referred to, is on file with the original exhibits in this case.

DEFENDANTS' EXHIBIT 12

Flathead Agency

Dixon, Montana

April 23, 1927

Commissioner of Indian Affairs,

Washington, D. C.

Sir:

The Commissioner of Indian Affairs under date of August 4, 1925, recommended the appointment of a Commission consisting of the Superintendent of the Flathead Agency, the Project Engineer of the Flathead Project and a disinterested member of the Flathead tribe, for the purpose of investigating claims for private water rights on the Flathead

(Testimony of Ray Biggerstaff.)

reservation. The recommendation was approved by the First Assistant Secretary on August 7, 1925.

Mr. Alphonse Clairmont, who was a member of the original Water Right Commission was selected as the third member of the Commission.

This Commission made field examinations of all lands on which applications for private water rights have been made. Public hearings were held for the purpose of taking testimony covering the various rights claimed.

The original Commission, whose report was approved by the Department on November 25, 1921, used as the basis of their findings:

“Beneficial use prior to the appropriation by the United States shall be the basis, the measure, and the limit of the right to the use of these waters at all times irrespective of the carrying capacity of the ditch and not exceeding for irrigation, a limit of two acre feet per annum at the point of diversion; that the right to the use of water for irrigation shall be inseparably appurtenant to the land, and no right for the use of water for irrigation can be acquired independent of its use upon and attached to [531] definite tracts of land, and that water rights cannot be detached from the land, place, or purpose for which they were acquired without the loss of priority.”

(Testimony of Ray Biggerstaff.)

It is believed to be a just and correct measure of private water rights, and having already recieved Departmental approval, is made the basis for the findings in the cases covered by this report.

It is recommended that the findings in the nineteen (19) cases covered by this report be approved.

Respectfully submitted,

(SGD) CHARLES E. COE

Superintendent Flathead Reservation.

(SGD) C. J. MOODY

Project Engineer Flathead Project.

(SGD) ALPHONSE CLAIRMONT

Member Flathead Tribe.

Allot. No. 734, Name Oro Deschamps
W $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W.,
Sec. T. N., R. W.

The Committee, on March 19, 1926, made an examination in the field of the irrigation system and water rights appurtenant of the lands of Bert Lish being allotment No. 734, comprising the W $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., and Sec. , T. N., R. W., and testimony was taken on , 19 .

From personal investigation on the ground, testimony taken and from facts shown on Plat F 1402, Sheet 19 made by an engineer employee of the United States Indian Irrigation Service after a

(Testimony of Ray Biggerstaff.)

survey by transit and stadia, it is determined that the water [532] right of 4.8 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ and 9.3 acres in SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., heretofore adjudicated is hereby confirmed, it is further determined that there have been irrigated an additional 26 acres from June Creek in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W. from an early date and entitling said 26 acres to a water right from June Creek, that said 40.1 acres hereinbefore described are determined to have a valid and subsisting water right from Post and June Creeks to the extent of 2 acre feet per annum; that none of the remaining area of said allotment has a water right from any source. Total water right 80.2 acre feet per annum. [533]

Q. Mr. Biggerstaff I will show you defendants' proposed exhibit 21 and will ask you what that is?

A. This is a certified copy of a map number 15229, April, 1914, United States Reclamation Service, of the Flathead Project in Montana.

Mr. Wallace: We offer 21 in evidence?

Mr. Simmons: No objection.

Mr. Smith: We have no objection.

The Court: In evidence without objection. [330]

Defendants' Exhibit 21, the instrument referred to, was then received in evidence without objection and is on file with the original exhibits in this case.

NOTE: THE LOCATION OF PROPOSED CANALS SHOWN ON THIS MAP SHOULD NOT BE CONSIDERED DEFINITELY LOCATED AS THEY ARE SUBJECT TO CHANGE OR ABANDONMENT UPON FURTHER INVESTIGATION



IRRIGATION PLAN. The plans for the Flathead Project provide for irrigation of about 152,000 acres of land in various parts of what was formerly the Flathead Indian Reservation. The water being diverted from creeks and rivers in the Flathead Mountains and conducted by canals directly to the land and to reservoirs for the storage of flood waters. The plan also provides for supplementing ground water by pumping from Flathead Lake. The area of the drainage basin is approximately 8,000 square miles. Irrigable area is about 152,000 acres. The project is divided into three divisions, the Flathead, the Little Belt, and the Sanders, which contain the largest percentage of irrigable land allotted to the Indians, have been selected for the first development.

DATA FOR COMPLETE PROJECT. Length of project, 117,556 feet. Aggregate capacity, 1,949,970 acre-feet. Length of canals, 14 miles with capacity greater than 300 second-feet, 86 miles with capacity less than 300 second-feet, 800 miles with capacities less than 50 second-feet. Tunnels, Aggregate length 3,968 feet. Irrigable area, 152,000 acres.

AGRICULTURE AND CLIMATIC CONDITIONS. Length of irrigating season May 1 to Sept. 30, 153 days. Average temperature during season 53.0° F. Average rainfall on irrigable area 15.1 inches. Range of temperature on irrigable area -30° to 90° F. Crops raised are wheat, corn, hay, alfalfa, and various fruits and vegetables. Varies from light sandy loam to heavy clay. Principal products, hay, grain, apples, vegetables, small fruits and cattle.

DEPARTMENT OF THE INTERIOR
UNITED STATES RECLAMATION SERVICE

FLATHEAD PROJECT MAP NO. 35229

APRIL 1914

SCALE OF MILES
1 0 1 2 3 4 5

EXPLANATION

RAILROAD

RAILROAD PROPOSED

TELEPHONE LINE

TELEPHONE LINE U. S. R.

CANALS

CANALS PROPOSED

TOWNSHIPS

(Testimony of Ray Biggerstaff.)

Q. I will show you defendants' proposed exhibit 22 and ask you what that is?

A. Certified copy of a letter signed by F. H. Abbott, Assistant Commissioner, addressed to the Honorable Secretary of the Interior, dated May 27, 1912.

Q. Relating to what?

A. Old Ditches and Water Rights on the Flathead Reservation.

Mr. Wallace: We offer 22 in evidence.

Mr. Simmons: No objection.

Mr. Smith: No objection.

The Court: In evidence without objection.

Defendants' Exhibit 22, the instrument referred to, was received in evidence without objection and is a part of the original exhibits in this case.

DEFENDANTS' EXHIBIT 22

United States

Department of the Interior

Office of Indian Affairs

Washington

May 27, 1912.

The Honorable

The Secretary of the Interior

Sir:

There is inclosed herewith a letter from Edward Clairmont, a prominent and well to do Indian living on the Flathead Indian Reservation in Montana,

(Testimony of Ray Biggerstaff.)

concerning water rights and ditch rights by reason of ditches constructed at the expense of the allottees before the beginning of construction of the present Flathead Irrigation project, which brings up the question of what relation Indians under such ditches shall bear to the present irrigation system as to charges for construction.

The Office has given careful consideration to the subject and believes that administrative equity requires a preservation of all such rights. It is therefore respectfully recommended (1) that this Office be authorized to have an examination made by a committee which shall include the Indian Superintendent, an Engineer employed on the works, and an Indian to be selected by the Indians for the purpose of determining the lands so affected; (2) that all lands covered by ditches constructed out of private or individual funds be determined to have paid up ditch rights and not subject to construction charges under the new system.

Respectfully,

F. H. ABBOTT

Assistant Commissioner.

Approved:

First Assistant Secretary.

(WCP) [542]

(Testimony of Ray Biggerstaff.)

June 3, 1912.

Commissioner Abbott:

The First Assistant Secretary directs me to return herewith the papers regarding old ditches and water rights on the Flathead Reservation, and to say that he approves of the first recommendation but not of the second. He thinks that in lieu of the second should be a requirement that the committee referred to shall report and make recommendations. He says he is not willing to make the determination covered by recommendation No. 2 in advance of the report of the committee. He thinks the committee had better examine into the matter and report as to whether and to what extent, the ditches should be taken into consideration on the question of charges.

JNO. HARVEY

Private Secretary [543]

Q. Mr. Biggerstaff I show you defendants' proposed exhibit number 23 and will ask you what that is?

A. That is a certified copy of a patent to the E¹/₂ NE¹/₄ of Section 16, Township 19 North, Range 19 West, in favor of Duncan McDonald.

Q. That is some of the land involved in this action, do you know?

A. To the best of my knowledge it is.

Mr. Wallace: We offer 23 in evidence.

(Testimony of Ray Biggerstaff.)

Mr. Smith: That land, I suppose, conforms to the description? [331]

Mr. Wallace: We hope so.

Mr. Smith: No objection.

Mr. Simmons: No objection.

The Court: In evidence without objection.

Defendants' Exhibit 23, the instrument referred to, was thereupon received in evidence without objection and is a part of the original exhibits in this case.

Q. I will show you defendants' proposed exhibit 24 and ask you what that is?

A. This is a certified copy of a patent in favor of Florence McDonald.

Q. That patent covers land involved in this action, so far as you know?

A. I think it does.

Mr. Wallace: We offer 24 in evidence.

Mr. Simmons: No objection.

Mr. Smith: We have no objection.

The Court: In evidence without objection.

Defendants' Exhibit 24, the instrument referred to, was then received in evidence without objection and is on file with the original exhibits in this case.

Q. And defendants' proposed exhibit 25 is what, Mr. Biggerstaff?

A. This is a certified copy of a patent in favor of Mary C. McDonald.

Q. And does that cover land involved in this action? A. It does.

(Testimony of Ray Biggerstaff.)

Mr. Wallace: 25 is offered in evidence. [332]

The Court: In evidence without objection.

Defendants' Exhibit 25, the instrument referred to, and so identified, *as* then received in evidence without objection, and is a part of the original exhibits on file in this case.

Q. I show you defendants' proposed exhibit number 26 and will ask you what that is?

A. Certified copy of patent to Frank Fiddler.

Q. And that covers land involved in this action?

A. Yes it does.

Mr. Wallace: We offer 26 in evidence.

Mr. Simmons: No objection.

The Court: It will be admitted.

Defendants' Exhibit 26, the document referred to, and so identified, was then received in evidence and is a part of the original exhibits on file in this case.

Q. And defendants' proposed exhibit 27 is what?

A. That is a certified copy of patent in favor of Mary and Joseph Deschamp—and Mary Rodgers Deschamp, heirs of William Deschamp, a Flathead Indian.

Q. And that patent covers land involved in this action?

A. It does.

Mr. Wallace: We offer it in evidence.

Mr. Smith: No objection.

The Court: It will be admitted.

Defendants' Exhibit 27, the document referred

(Testimony of Ray Biggerstaff.)

to, so identified, was thereupon received in evidence and is on file with the original exhibits in this case.

[333]

Q. And I will show you Defendants' Exhibit 28, and ask you what that is?

A. That is a certified copy of a patent in favor of Edward Deschamps.

Q. That patent covers land involved in this action? A. Yes it does.

Mr. Wallace: We offer Exhibit 28 in evidence.

Mr. Smith: No objection.

Mr. Simmons: No objection.

The Court: It will be admitted.

Defendants' Exhibit 28, the document referred to, was then admitted in evidence without objection and is a part of the original exhibits in this case.

Q. And Exhibit 29 is what, Mr. Biggerstaff?

A. That is a certified copy of a patent in favor of claimant, Oro Deschamp Freeman.

Q. That patent covers land involved in this action? A. It does.

Mr. Wallace: We offer 29 in evidence.

Mr. Simmons: No objection.

The Court: It will be admitted.

Defendants' Exhibit 29, so referred to, and so identified, was thereupon admitted in evidence and the same is on file with and forms a part of the original exhibits in this cause.

Q. And I show you Exhibit 30 and will ask you what that is?

(Testimony of Ray Biggerstaff.)

A. This is a certified copy of a patent in favor of John Minesinger.

Q. I will ask you if the land described in this patent is [334] involved in this action?

A. Yes it is.

Mr. Wallace: We offer 30 in evidence.

The Court: It will be admitted.

Defendants' Exhibit 30, so referred to, identified as such, was thereupon received in evidence and is a part of the original exhibits in this case.

Q. And Exhibit number 31 is what, Mr. Biggerstaff?

A. Certified copy of a patent in favor of James Waymack.

Q. And covers land involved in this action?

A. Yes it does.

Mr. Wallace: We offer Exhibit number 31.

The Court: It will be admitted.

Defendants' Exhibit 31, the instrument referred to and so identified, was thereupon received in evidence and is on file with the original exhibits in this case.

Q. And Exhibit 32 is what, Mr. Biggerstaff?

A. Certified copy of a patent in favor of Emma M. Magee.

Q. And covers land involved in this action?

A. Yes.

Mr. Wallace: We offer Exhibit 32 in evidence.

The Court: It will be admitted.

(Testimony of Ray Biggerstaff.)

Defendants' Exhibit 32, the instrument referred to, was thereupon received in evidence, so identified, and is a part of the original exhibits in this case.

Q. I show you defendants' proposed exhibit 33 and will ask you what that is, Mr. Biggerstaff?

A. This is a certified copy of an Amended Schedule of Lands [335] in the Flathead Indian Reservation subject to entry September 1, 1910.

Q. And does it contain information relative to the farm units subject to entry on that date?

A. Yes.

Mr. Wallace: We offer Defendants' Exhibit number 33 in evidence.

Mr. Simmons: No objection.

Mr. Smith: We object to Exhibit 33 in so far as it is or may be an attempt to bind any of the owners of farm units on the Flathead Reservation, for the reason that the same appears to be a letter—it does not appear that the letter was ever received by any of the owners of farm units or ever given any publicity or that the contents thereof were ever called to the attention of any of the purchasers of farm units, and that in the absence of some such showing, some letter which may have been written would not be binding on the owners of the farm units.

The Court: Objection overruled. The exhibit will be admitted.

Defendants' Exhibit 33, so received in evidence, and so identified, is on file with and forms a part of the original exhibits in this case.

(Testimony of Ray Biggerstaff.)

Q. Mr. Biggerstaff, at the time——

The Court: Just a moment; all of these exhibits, from 21 to 33, both inclusive, will be considered as read into the record; any party interested may refer to them at any time during the trial or in briefing, as a part of the record. Proceed.

DEFENDANTS EXHIBITS 23 - 32 and 34

Exhibits Nos. 23 to 32, inclusive, are certified copies of the original trust patents for the lands now owned by the defendants. These exhibits show that such lands were originally patented to Indian allottees on October 8, 1908. Exhibit No. 34 is a deed showing that the defendant Beckwith Mercantile Company on August 22, 1934, conveyed certain property occupied by the defendant, John A. Hazel, to Clarence L. McVey and Lillian L. McVey, husband and wife, by deed recorded subsequent to the commencement of this action.

DEFENDANTS' EXHIBIT 33

Exhibit No. 33 is a certified copy of an amended schedule of lands in the Flathead Indian Reservation, dated April 10, 1910. The lands therein described are Farm Units and lands not in Farm Units opened to settlement on September 1, 1910, under the Acts of Congress approved April 23, 1904, and May 29, 1908. The schedule gives instructions to settlers on surplus unallotted lands, and contains among other things the following:

(Testimony of Ray Biggerstaff.)

“The Government is now constructing irrigation works from which the farm units will be irrigated as far as possible, but it cannot at this time be told what part or how much of any particular unit can be furnished with water. It is probable that water can be furnished to only a small portion of some of these units, and it is possible that there will be no water at all for some of them, nor can it be told now when the water will be ready for any of these units, as the development of the irrigation projects has not yet proceeded far enough to enable the giving of definite [555] information on this subject at this time. All applicants must bear this fact in mind and make their selections accordingly, as they will act on their own responsibility and without any guarantee from the Government, and the fact that water has not or cannot be furnished will not excuse any entryman from a full compliance with the requirements of the law as to residence, cultivation, and the payment of the Indian price.” [556]

Q. (continued) Approximately where was the homestead [336] located, that you settled upon?

A. Well it was the east half of Section 25, 19-21.

Q. By 19-21 you mean Township 19, Range 21?

A. That's right.

(Testimony of Ray Biggerstaff.)

Q. And that's within this Flathead Project?

A. That's right.

Q. At the time that you homesteaded that land did you know whether or not there would be irrigation water available for you for use on that land?

A. As a future proposition we doubted it.

Mr. Simmons: No cross examination.

Mr. Smith: No cross examination.

Witness Excused.

CHARLES SANDERS

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. State your name? A. Charles Sanders.

Q. And where do you live? A. Arlee.

Q. How long have you lived there?

A. Well, thirty-three years.

Q. Where were you living in the spring of the year 1904? A. In Dillon, Montana.

Q. Did you leave Dillon, Montana, in the spring and summer of 1904? [337]

A. I did—not the spring—in the summer.

Q. At about what time? A. July 14.

Q. 1904? A. Yes sir.

Q. And where did you go?

(Testimony of Charles Sanders.)

A. I come to the Flathead Reservation.

Q. And to what town or place did you go to on the Flathead Reservation?

A. Saint Ignatius.

Q. And did you at that time or did you become, shortly thereafter, acquainted with Joe McDonald?

A. Yes sir I did.

Q. And Mr. Deschamps?

A. I was acquainted with Mr. Deschamps in the Bitter Root when we were kids; I was acquainted with Mr. Deschamps long before that, in the Bitter Root.

Q. Did you perform any work for Mr. Joe Deschamps and Mr. Joe McDonald and Mr. Deschamps that year? A. I did.

Q. What was that work? A. Ditch work.

Q. About when did you commence doing ditch work?

A. Well it was during the last of August or the first of September.

Q. Of——

A. ——Of 1904.

Q. And where was this ditch work you did?

A. Post Creek.

Q. Well on that work that you did was that on what is now [338] known as the McDonald-Deschamps Ditch?

A. Well I suppose it was; I have never been back there since the work was done.

(Testimony of Charles Sanders.)

Q. Well where did you do this work—ditch work—that you did?

A. Right at the mouth of the Lake.

Q. What Lake? A. At McDonald Lake.

Q. And did the ditch divert water or did it connect with some creek? A. Post Creek.

Q. How far approximately below the Lake did the ditch tap the creek?

A. Well I should judge maybe 50 feet.

Q. You haven't been back there, you say, since you dug this ditch? A. No sir.

Q. You started the latter part of August, or September—how long did you work?

A. Well about a month, I have an idea about a month, as near as I can remember.

Q. Was anyone helping you? A. Yes sir.

Q. Who? A. William Turnidge.

Q. And about how many feet or rods or miles of ditch did you construct?

A. Well about a mile I should judge.

Q. And tell us whether or not the ditch that you dug came out of the timber? [339]

A. Well I worked until we got out to the edge of the timber—just the edge of the timber.

Q. Do you know who afterwards that land was allotted to where you stopped digging the ditch?

A. Well not only just hearsay, yes.

Q. Was that the Duncan McDonald allotment?

A. Well I couldn't say.

(Testimony of Charles Sanders.)

Q. But the ditch—you did dig the ditch clear from the timber on out in the open?

A. Out into the open, yes sir.

Q. Was there anyone else worked on that ditch besides you and Mr. Turnidge?

A. Well we worked by contract for a short time and then we went to work for wages, and Joe Deschamps was up there some and bossed the job, and Bill Deschamps.

Q. And did anyone actually work on the ditch besides you and Turnidge?

A. I think a man by the name of Murray worked on the ditch some.

Q. Are you sure that that portion of the ditch was constructed in the year 1904? A. Yes sir.

Q. Did you construct any more of the ditch to the various lands of the defendants in this case?

A. No.

Q. That's all you did? A. Yes sir.

Mr. Simmons: No cross examination.

Mr. Smith: No cross examination.

Witness Excused. [340]